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SUPREME COURT PRONOUNCEMENTS

The Pawnee by acquiring the status of 'beneficial owner' of pledged share doesn't defeat the claim for debt equal to the value of the shares.

PTC INDIA FINANCIAL SERVICES LTD. V. VENKATESWARLU KARI AND ANOTHER

Court	Supreme Court of India
Judgement Dated	May 12, 2022
Bench	Justice M.R. Shah, and Sanjiv Khanna.
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Section 10, Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 – Regulation 58, Indian Contract Act, 1872 – Section 176, the Depositories Act, 1996

Brief Background

PTC India Financial Services Limited (hereinafter "the financial creditor") is a Non-Banking Finance company which is the business of investing in power and energy sector projects in India. The financial creditor advanced a loan of Rs. 125 crores by way of the bridge loan agreement to NSL (Nagapatnam Power and Infratech Limited; hereinafter "the corporate debtor"), which is a subsidiary of Mandava Holdings Private Limited (hereinafter "MHPL") on the condition that the loan must be secured. To secure the loan, MHPL pledged 31,80,678 shares, equivalent to 26% of the shares of NSL Energy Ventures Private Limited, which is also a subsidiary of MHPL. On 17th November 2017, the Corporate Debtor filed an application under Section 10 of IBC to initiate CIRP against itself in NCLT. This application was admitted and in furtherance of the application, Mr. Venkateswarlu Kari was appointed as Interim Resolution Professional (hereinafter "IRP").

After default by the corporate debtor on 28th December 2017, the financial creditor issued a notice under the Pledge Deed apprising MHPL of the defaults. On failure of the corporate debtor to pay the debt within stipulated time under notice, the creditor exercised its rights in terms of the Pledge deed. Based on the request of the creditor the Depository Participant has accorded financial creditor status of 'beneficial owner' of pledged shares. Subsequently, the corporate debtor informed MHPL that it had exercised its rights while reserving its right to sell the shares under Clause 6.2 of the Pledge Deed read with Section 176 of the Contract Act.

On 17th January 2018, the corporate debtor filed an application before the NCLT under Section 7 of the IBC as a financial creditor to whom Rs. 167,29,23,507/- was due without deducing the amount of 31,80,678 shares. However, MHPL claimed in front of IRP that since the corporate debtor becomes the beneficial owner of pledged shares and MHPL has no right in those shares, the MHPL has stepped into the shoes of the financial creditor for the amount of 31,80,678 shares. The IRP rejected the claim of MHPL as the value of shares is not ascertained. Similarly, IRP rejected the financial creditor claim due to the settlement in whole/part of its claim and the need to arrive at the valuation at the time of 'transfer' of shares to the financial creditor. On application to NCLT, the NCLT agreed with MHPL that it had stepped into the shoes of the financial creditor for the amount of 31,80,678 shares. On appeal by the financial creditor in NCLAT, NCLAT also upheld the claim of MHPL. The NCLAT further held that the fact that the corporate debtor had not thereafter sold the shares under Clause 6.2 of the pledge deed would not matter. As the financial creditor had become the 100% owner of the pledged shares, it could realise its dues in whole or part by sale and transfer of the shares according to the law. Once the financial creditor has exercised the right to become the owner of the shares, it cannot take advantage of Section 176 of the Contract Act to 'reclaim' the debt. Aggrieved by this judgement of the NCLAT the present appeal arises.

Issue

1. Whether the Depositories Act, 1996 read with the Regulation 58 of the Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 has the legal effect of overwriting the provisions relating to the contracts of pledge under the Indian Contract Act, 1872 and the common law as applicable in India?

Decision

In the present case the Apex Court, first of all, noted that in a pledge, the pawnee has only the special right in the goods pledged, namely, the right of possession as security and in case of default he can bring a suit against the pawnor as well as sell the goods after giving a reasonable notice as mentioned under Section 176 of the Contract Act. The object of such notice is to make the pawnor know about the pawnee's intent to sell and to give the pawnor an opportunity to exercise his statutory right to redeem. The Supreme Court further noted that even after default, the pawnor has the right to redeem pledged goods at any time before the actual

sale of goods. After the actual sale, the pawnee needs to appropriate sale proceeds towards debt.

The Apex Court then noted that the Depository Act only introduced the concept of 'registered owner' and 'beneficial owner' and in no way affected Section 176 and 177 of the Contract Act. Similarly, the Apex Court noted that Regulation 58(8) of Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 also doesn't affect the Contract Act. Thus, the Apex Court make the pertinent observation that the Depository Act and Regulation 58(8) of Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 only stipulates that if a pawnee wants to exercise his right to sell dematerialized security, it is mandatory first to get himself recorded as a 'beneficial owner' in the 'depository's records. Without the said exercise, the pawnee cannot exercise its rights to sell the pledge and retrieve the monies due by taking recourse to its rights under Section 176 of the Contract Act. The Apex Court also highlighted that the consequent action on the part of the 'depository' recording the pawnee as the 'beneficial owner' is not 'actual sale' and that the due of the creditor can only be settled after the actual sale of the property after which pawnor right to redemption is extinguished.

Thus, based on the above the Apex Court held that the pawnee by acquiring the status of 'beneficial owner' has only complied with the stipulations provided under the Depository Act and Regulation 58(8) of the Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996. Such status does not result in the discharge of the debt equal to the value of the shares. The discharge of debt in whole or part occurs when the pawnee exercises his right to sell the shares after giving notice to the pawnor and selling the pawn. Upon the actual sale, the pawnee can apply the net proceeds of the sale or disposition. Thus, the Apex Court allowed the appeal and held that the financial creditor is not by just acquiring the status of the beneficial owner is liable to settle the amount of shares for debt.

Comment

The Supreme Court by way of this decision has made sure that there is no ambiguity in deciding cases which involve a pledge transaction. The Court has clearly explained the relevance of the 'beneficial owner' status in such pledge transactions, thereby providing clarity with regard to the stage at which the debt is seen as discharged. Most proceedings under the IBC in some way or the other deal with a pledge transaction, and such decisions by the Court are of great assistance to the AA while deciding matters.

"Gaurav Balpande

HIGH COURT PRONOUNCEMENTS

Institution or continuation of pending suits or proceedings against corporate debtors is prohibited during the moratorium period.

SREI EQUIPMENT FINANCE LIMITED v. ADDITIONAL/JOINT/DEPUTY/ASSISTANT COMMISSIONER OF INCOME TAX AND OTHERS

Court	High Court of Judicature, Calcutta
Judgement Dated	May 10, 2022
Bench	Justice T. S. Sivagnanam and Justice Hiranmay Bhattacharya
Relevant Sections	IBC, 2016 - Sec. 14

Brief Background

The appellant had filed a writ petition challenging a notice dated March 23, 2022 for the appellant to show cause as to why the proposal made in the notice by way of giving effect to the order passed by the PCIT, Kolkata-II under Sec. 263 of the Income Tax Act, 1961, should not be made against the appellant/assessee. The appellant, in their reply dated March 26, 2022, stated that a moratorium under Sec. 14 of the IBC was operational due to a CIRP that had been initiated against them. Therefore, it was contended that the proceeding was liable to be stayed. Placing reliance on the decisions in *Alchemist Asset Reconstruction Company vs. Hotel Gaudavan (P) Ltd. & Ors.* and *Mr. Rajendra K. Bhutta vs. Maharashtra Housing and Area Development Authority & Anr.*, the appellant requested a personal hearing under Clause (VI) to (IX) of Sec. 144B (7) of the Income Tax Act, 1961. Thereafter, it filed the writ petition challenging the said show cause notice. Two other requests were made by the appellant in response to other such notices with respect to similar proceedings under Sec. 263 and Sec. 143(3). PCIT-II passed an order dated March 23, 2022 to keep the proceedings in abeyance. The appellant further requested for an opportunity of effective hearing since personal hearing could not be conducted due to technical issues, and the "so called hearing" ended up being conducted through messaging in the chat box. The assessing officer did not respond to the message, and instead, issued the assessment order dated March 30, 2022. Upon receiving the said order, the appellant filed a supplementary affidavit before the writ court, bringing on record the assessment order passed during the pendency of the writ petition. The single bench dismissed the writ petition by the order, leading to the present appeal.

Issue

Whether the proceedings had to be kept in abeyance by the assessing officer in the light of the insolvency proceedings that were pending and the effect of Sec. 14 of the IBC have not been dealt with?

Decision

The high court observed that the writ court had wrongly considered the facts when it opined that the assessment order was not in violation of principles of natural justice since the appellant had participated in the assessment proceedings, and they wanted to challenge the assessment order before the writ court. According to the court, the assessment order was challenged by a supplementary affidavit since this assessment order was passed during the pendency of the writ petition challenging the show cause notice on the basis on provisions of IBC. Moreover, the assessing officer also pointed out that in the assessee's own case, the PCIT-II had acceded to a similar request and kept the proceedings in abeyance in view of the moratorium being imposed. The court relied on *Alchemist Asset Reconstruction Company v. Hotel Gaudavan (P) Ltd. & Ors.* to follow the legal principle of "interdiction of institution", or the continuation of pending suits or proceedings against corporate debtors during the moratorium period.

Further, the court noted that the assessment order was an *ex-parte* order, since the appellant's request for a personal hearing was denied - yet the hearing appears to have been conducted through the exchange of chat messages. The court said that such an opportunity does not amount to an effective opportunity to be heard as the same should be a meaningful opportunity rather than an empty formality. The court also observed that the assessing officer did not consider the judicial pronouncements which had been referred to by the assessee in their reply. The court, therefore, found that the assessing officer had erred in proceeding to complete the assessment, passing the order, and refusing to stay the proceedings till the completion of the CIRP.

Additionally, the court observed that, in the penultimate portion of the order, the writ court had imposed cost on the appellant's advocate for rude and disrespectful behaviour without recording any findings in support of the same. For this issue, the Court relied on the judgement of *Neeraj Garg v. Sarita Rani & Ors.* in

which it was stated that making harsh remarks against counsel appearing for a party without giving them an opportunity to be heard would be a violation of the principles of "*audi alteram partem"*. The Court should exercise necessary restraint and sobriety, and if the comments stay unexpunged in the judgement, it would be a "cross" that the appellant would have to wear for the rest of their life - to allow them to suffer like this would be unfair and unjust. Further, the Court relied on the case *Director General of Income Tax (INV.) and Others vs. T. S. Kumaraswamy, Proprietor, Christy Friedgram Industry and Others*, wherein it had been observed that the court did not give any opportunity to the appellants, who were not parties to the writ petition, to defend themselves before making such remarks. The same principle had been reiterated in the case of *Manish Dixit v. State of Rajasthan*. Such remarks have been quashed by the courts in various cases such as *State of Gujarat Vs. K.V. Joseph*, *Testa Setalvad v. State of Gujarat* and *Samya Sett v. Shambu Sarkar.*

The court concluded that the assessment order was liable to be set aside, and the matter was restored to the file of the assessing officer. Further, it was held that the matter shall be kept in abeyance till the completion of the CIRP. Once the CIRP is completed, the appellant must inform the assessing officer of the same. In addition to this, the adverse observations and comments made against the learned advocate for the appellant are expunged, and the imposition of costs stands vacated.

Comment

The appellate civil bench of the Calcutta High Court has placed reliance on the decision in the case of *Alchemist Asset Reconstruction Company v. Hotel Gaudavan (P) Ltd. & Ors.* to apply the settled principle of law in the present case. The court rightly concluded that the "interdiction of institution", or the continuation of pending suits or proceedings against corporate debtors during the moratorium period, should be followed.

"Isha Akat

Mere Filing of Sec. 7 Application under IBC does not embargo the jurisdiction of the Court to exercise powers under Sec. 11 of the Arbitration and Conciliation Act, 1996.

JASANI REALTY v VIJAY CORPORATION

Court	High Court of Bombay
Judgement Dated	April 25, 2022
Bench	G.S. Kulkarni (J)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Sec. 7; The Arbitration Conciliation Act, 1996 Sec. 11

Brief Background

The Respondent in the course of its usual business with the Applicant had provided the applicant with financial assistance of Rs. 4,50,00,000/- via a loan agreement dated 23rd April 2015. Further, via another agreement dated 5th July 2016, the parties extended the date of repayment in the previous loan agreement from 20th June 2015 to 31st March 2017. Despite this extension, there were defaults in repayment by the applicant. A cheque dated 7th September 2021 for an amount of Rs. 31,08,33,457/- was issued by the applicants to the respondents in payment of their dues till 31st August 2021. This cheque was dishonoured when presented for payment. It is under these circumstances that the respondents approached the NCLT and filed an application under Sec. 7 of the IBC.

The Applicant contends that these agreements have an arbitration clause in them and in pursuance of which a notice had been issued by the applicant's advocate on 10th December 2021 to the respondents invoking this arbitration clause. In this notice, the applicant had suggested the name of the sole arbitrator and since the respondent had failed to agree on the same, the present application under Sec. 11(6) of the Arbitration Conciliation Act, 1996 has been filed.

The respondent in this Sec. 11 application contends that the Sec. 11 petition is only an afterthought in an attempt to escape the rigour under IBC and to dilute the NCLT proceedings. He further contends that there is sufficient record to show the applicant's admission of liability and failure to pay the outstanding amount payable to the respondents under these loan agreements. The Respondent contends that the Sec. 7 application under the IBC being filed prior to the Sec. 11 application under the Arbitration Act, it ought to be adjudicated first and in furtherance of this contention, they rely on paragraph 25 of *Indus Biotech Private Limited v Kotak India Venture (offshore) Fund* [(2021) 6 SCC 436]. The respondent further contends that a holistic reading of the decision in Indus Biotech would bring about a position in law that IBC proceedings are required to be given primacy till NCLT passes an order under Sec. 7 of the IBC Code, the Sec. 11 application under the Arbitration Act ought not to proceed.

The applicants too rely on the decision of *Indus Biotech* and emphasize the distinction laid down in this case on the pre-admission stage and post-admission stage of the proceedings under the IBC and the effects of it on Arbitration proceedings. The applicant's contention is that once a Sec. 7 petition under the IBC has been admitted there will be an embargo on the powers of the AA court to exercise jurisdiction under Sec. 11 of the Arbitration Act, however, if the Sec. 7 petition under the IBC is at the pre-admission stage, then, there is no embargo on the powers of the court to act on proceedings filed under Sec. 11. The reason for this distinction in *Indus Biotech's* case is that post admission, proceedings under Sec. 7 become proceedings in rem.

Issue

Whether mere filing of a proceeding under Sec. 7 of the IBC would amount to an embargo on the Court considering an application under Sec. 11 of the Arbitration and Conciliation Act,1996, to appoint an arbitral tribunal?

Decision

On an analysis of paragraphs 22 and 24 of the *Indus Biotech* Judgment, the Court lays down that once a Sec. 7 proceedings are admitted, it assumes the status of proceedings in rem. Admission of Sec. 7 application creates third-party rights and has an erga omnes effect. It was also, laid down that a mere filing of Sec. 7 application will not be considered as triggering of proceedings in rem. The admission of the application for the CIRP would be the relevant stage to determine the status and nature of the pendency of the proceedings, and the mere filing of Sec. 7 proceedings cannot trigger the insolvency process. Hence, only on admission of Sec. 7 application will the court have an embargo on the exercise of its powers under Sec. 11 of the Arbitration Act.

In reply to the contention of the Respondent, this court analysed paragraph 25 of the judgment and laid down that in a case where both an application under Sec. 7 of the IBC code as well as an application under Sec. 8 of the Arbitration Act have been filed before the NCLT, there the court will have the duty to decide the Sec. 7 application prior to the Sec. 8 application. The respondent's contention that mere pendency of the Sec.

7 proceedings and that too at pre-admission stage would be an embargo for the Court, not to entertain a petition filed under Sec. 11 of the Arbitration Act is not valid and the court forfeited this submission by relying on paragraphs 25-27 of the *Indus Biotech* judgment. It is clarified by paragraph 27 of the Indus Biotech judgment that any Sec. 8 application under the Arbitration Act that is filed after a Sec. 7 application of the IBC has been filed will be the duty of the court to decide the Sec. 7 application prior to the Sec. 8 application under the Arbitration Act.

Accepting such submission of the respondent would lead to an anomalous situation, so as to bring about a consequence that mere filing of the proceedings under Sec. 7 of IBC would be required to be construed to mean ousting the remedy which the law has otherwise provided and made available to a party to enforce an Arbitration agreement and redress its claims under the agreed arbitration procedure. Such remedy would certainly be available to a party till the proceedings under the IBC are admitted as noted above. Once the Sec. 7 IBC proceedings are admitted, the provisions of Sec. 238 of the IBC would get triggered to override the application of all other laws, as in such event, the CIRP would commence, against such corporate debtor as per the provisions of Sec. 13 of the IBC which would be proceedings in rem. In conclusion, the court held that it had jurisdiction to appoint an arbitral tribunal for the disputes and differences between the parties under the agreement in question. However, this order was not required as the parties settled their dispute.

Comment

A mere filing of a Sec. 7 application does not act as a complete bar on proceedings. It is only when this application is accepted that moratorium is imposed. This means that arbitration proceedings cannot be initiated once a Sec. 7 application has been accepted. This decision of NCLT is a welcome decision as it upholds the Indus Biotech judgment, furthering the jurisprudence in this question.

"Jyotika Raichandani

NCLAT PRONOUNCEMENTS

Two laws will never conflict with certain boundaries of their own.

RESERVE BANK OF INDIA v. SREI INFRASTRUCTURE FINANCE LIMITED

Court	National Company Law Appellant Tribunal, Kolkata Bench - 1
Judgement Dated	May 17, 2021
Bench	Rajasekhar V.K. Member (Judicial), Balraj Joshi Member (Technical)
Relevant Sections	Sections 3(11), 4, 4(1), 5(8), 7, 13, 14, 15, 17, 18, 19, 20, 31(1), 227, 239(2)(zk) – Insolvency and Bankruptcy Code, 2016; Section 45-IE – Reserve Bank of India Act, 1934; Rules 5, 6 – Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudication Authority) Rules, 2019.

Brief Background

Mr Hemant Kanoria, shareholder of SREI Infrastructure Finance Limited ("SIFL") and SREI Equipment Finance Limited ("SEFL") Respondent No. 1 and Respondents No. 2 and member of SIFL's suspended Board of Directors, has filed IA (IB) No.75/KB/2022 under section 60(5) of the Insolvency and Bankruptcy Code ("IBC"), who is the Applicant, inter alia praying for setting aside the appointment of KPMG Assurance and Consulting Services LLP ("KPMG") and restraining Axis Bank Limited the Respondents No. 5 and Respondents No. 4 from conducting or proceeding with the process of audit through KPMG.

The Applicant in the present case wanted following out of the present application.

(a) Directing the Respondent Nos.3 and 4 to forthwith, withdraw and/or rescind the process of audit of the Corporate Debtor as being conducted by the KPMG in light of the Corporate Insolvency Resolution Process of the Corporate Debtor; (b) Setting aside the audit process conducted by KPMG in respect of the Corporate Debtor in light of the initiation of CIRP of the Corporate Debtor and in light of the subsequent appointment of BDO India LLP as an auditor by the Resolution Professional in respect of the Corporate Debtor; (c) Further restraining Respondent Nos.3 and 4 banks from conducting and/or proceeding with the process of audit of the Corporate Debtor through KPMG during CIRP of the Corporate Debtor; (d) An order restraining the Respondent Nos.3 and 4 from publishing any information based on the alleged improper audit being conducted or conducted by KPMG. (e) An injunction restraining the Respondent No.5 from continuing with any audit of the Corporate Debtor pursuant to the appointment of 13th April 2021 or from publishing any report or publishing any information in connection with the said audit.

Respondents No. 1 and Respondents No. 2 are under Corporate Insolvency Resolution Process ("CIRP") from 08 October 2021, and Mr Rajneesh Sharma was appointed as the Administrator of SIFL and SEFL.

The Respondents were served with notice. Respondents Nos. 1 and 2 filed their replies on February 14, 2022, Respondents Nos. 3 and 4 filed their replies on February 14, 2022, and Respondent No. 5 filed its reply on February 11, 2022. Respondent No.5 filed a preliminary reply on January 31, 2022, prior to the filing of the min reply. Respondent No.5 filed an additional response on February 4, 2022, via a letter dated February 3, 2022.

In accordance with the Reserve Bank of India's ("RBI") Circular dated 01 July 2016 bearing No. RBI/DBS/2016-17/28DBS.CO.CFMC.BC. No.1/23.04.001/2016-17 as updated on 03 July 2017 ("RBI Circular''), Axis Bank Limited and UCO Bank appointed KPMG as SIFL's auditor on 23 March 2021. The administrator appointed BDO India LLP after the CIRP against SEFL and SIFL was launched. On November 2, 2021, as the transaction auditor for SEFL and SIFL under the IBC, to evaluate vulnerable transactions.

According to the RBI Circular, KPMG had three months from the date of the Joint Lenders Forum ("JLF ") meeting authorising the audit to complete it and submit a report. In this case, the Core Committee Meeting took place on March 24, 2021. As a result, KPMG was required to finish the audit by June 24, 2021. KPMG, on the other hand, continued to audit SIFL even after the CIRP was launched.

The Applicant wrote to KPMG on several occasions, requesting KPMG to share the preliminary report for comments by the suspended Board of Management and to stop the finalization of the report in view of the commencement of CIRP.

Mr Abhinav Vasisht, learned Senior Counsel appearing for Respondent Nos. 3 and 4, stated at the outset of the hearing that Axis Bank Limited circulated the final report of KPMG ("KPMG Report") among the lead bankers on December 28, 2021, and UCO Bank circulated the same to 36 lenders, including ECB lenders, on December 29, 2021.

Mr Ramji Srinivasan, learned Senior Counsel appearing on behalf of the Respondent No.5, submitted that the

KPMG report was completed on 22 December 2021 with the participation of the suspended management and the KPMG report had already been circulated on 28 December 2021 and 29 December 2021.

Issues

1. Whether the Applicant has locus?
2. Whether this Adjudicating Authority has jurisdiction?
3. Whether the IBC will prevail over the RBI guidelines?
4. Whether two audits can continue simultaneously?

Decision

Interim Application was dismissed with certain observations and Interim orders shall stand vacated. Further the National Company Law Tribunal - Kolkata Bench ("Tribunal") dismissed the application on the following grounds:

Issue of locus

The Applicant was a member of the superseded Board of Management and one of SIFL and SEFL's shareholders. While the Applicant's locus as a member of the superseded board may be in doubt, the application was unquestionably maintainable in his capacity as a shareholder, as he was a key participant in the process.

Issue of jurisdiction

The lenders commissioned the audit, which was carried out in accordance with the relevant RBI circulars. RBI circulars have statutory force, as determined by a five-member Constitutional Bench of the Hon'ble Supreme Court in *Central Bank of India v Ravindra & others*, in which it was decided to hold that the RBI is one of the country's guardian, delegated with a supervisory position over financial services and the power to issue binding instructions. It was tried to present and compel the IBC to take priority over RBI circulars that contradict the IBC It was contended that once the CIRP started, the IBC encapsulated adequate regulations to scrutinize fraudulent, preferential, undervalued, or extortionate transactions, and that the previous audit or audit report should not be taken into account.

The RBI audit's scope, purpose, and objective were not only to look into fraud by a banking official, which would not be an offence transaction from the perspective of the corporate debtor now working under an independent professional, but also to uncover lawlessness. We continue to believe that this Adjudicating Authority, with the rights conferred by the IBC, lacks the authority to cease an audit commissioned in accordance with RBI circulars, the intent of which is altogether distinct.

Whether the IBC will prevail over the RBI guidelines

An audit guided under the IBC is an audit that is performed solely from the perspective of the corporate debtor and its suspended management and is restricted to the books of the corporate debtor while an audit instituted by lenders under RBI's circulars deals with various aspects.

The Banks decided to appoint auditors to audit the financial statements beginning in 2016 as a result of the RBI circular. The banks had already hired KPMG to examine SIFL and SEFL's financial statements from 2016 to see if there was any evidence of fraud. The financial books of SIFL and SEFL could be verified by BDO LLP for a period of two years prior to the date on which SEFL and SIFL were admitted to CIRP.

Further the Applicant's concerns that the KPMG report has serious limitations for end-use, and that no effective inquiries were made with the ex-management before the report was finalized also there were concerns regarding the veracity of the report. The Applicant claims that the report was tailored to the needs of the lenders, who wanted to "implicate" the ex-management of the SREI entities. We are unable to scrutinize this matter since we have ascertained that we lack the necessary jurisdiction. This order, however, does not preclude the applicant from seeking justice in the future if he so desires.

Whether two audits can continue simultaneously

The extent and objective of the two audits differ. The audit commissioned by the Administrator should ultimately function to resolve the corporate debtor's insolvency. The audit objective under RBI circulars differs. As a result, there is no rationale to object to the two audits being performed parallelly. The order by NCLT has gone in depth in answering all the issues raised and provided an analyzed decision.

Comments

The IBC and the RBI circulars work in different fields and are, in a manner of speaking, disjoint sets. There is no possibility of conflict between the two. There is no question of one prevailing over the other. The order has dealt with all the issues in an extensive manner and provided a holistic blueprint about the extent and scope of the IBC. The order identifies and creates boundaries about the powers that can be exercised by the IBC, whether it has jurisdiction over certain issues. Thus, this order takes into cognizance all the facts which are

relevant to come to a conclusion and provides an order which is good in law.'

"Samarth Garg

The IBC does not contemplate that all creditors be given equal treatment – it is equitable treatment only within the same class.

DAMODAR VALLEY CORPORATION v. DIMENSION STEEL AND ALLOYS & ORS.

Court	National Company Law Appellate Tribunal – Principal Branch, New Delhi
Judgement Dated	May 23, 2022
Bench	Justice Ashok Bhushan, Ms. Shreesha Merla (T)
Relevant Sections	IBC, 2016 – Sec. 12, 30(2)(e), 30(2)(b) and the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013

Brief Background

Dimension Steel and Alloys Pvt. Ltd. (the "Corporate Debtor") had obtained and entered into a Power Purchase Agreement with Carbon Resources Pvt. Ltd. (the "Appellant") for the supply of electricity in its premises on November 30, 2012. It committed default on making payment of the electricity dues and was thereafter sent disconnection notices by the appellant. On June 6, 2019, the power supply was disconnected. Later, on October 18, 2019, the CIRP was initiated upon application by the appellant under Sec. 9 of the IBC. After an extension of the date for submission of the resolution plan by the CoC (after no resolution plans were received till January 4, 2021), the CoC decided to go for liquidation.

Respondent No.3, C.P. Ispat Pvt. Ltd, filed an interlocutory application before the Adjudicating Authority (hereinafter the "AA") seeking directions from the resolution professional to accept the resolution plan filed by it. Thereafter, another application was filed by the resolution professional seeking liquidation. The former application was allowed by the AA and March 22, 2021, was fixed as the date for placing the resolution plan before the CoC. One of the "financial creditors", the West Bengal Financial Corporation (hereinafter the "WBFC") filed an application seeking an injunction against the actions of the CoC and the resolution professional, which was dismissed by the Adjudicating Authority. The resolution plan that had been submitted by Respondent No.3 was approved by the CoC with 80.93% voting shares.

An application was filed by the resolution professional for the approval of the resolution plan, and another was filed by the WBFC before it the aforementioned application's dismissal. The AA approved the plan vide order dated October 8, 2021, after which, an amount of Rs. 7,45,608/- was transferred to the appellant as the operational creditor. The appellant, aggrieved by the order of the AA approving the resolution plan, has filed the present appeal.

Issue

1. Whether the CoC's consideration of the resolution plan submitted by Respondent No.3 after the expiry of 330 days vitiates the approval of the resolution plan?
2. Whether the appellant is entitled to claim its unpaid CIRP dues as per the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013, even after the approval of the plan?
3. Whether the resolution plan violates Sec. 30, sub-section (2), sub-clause (e) in view of the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013, since it contravenes Regulation 4.6.4 as well as Regulation 4.6.1 of the statutory regulations?
4. Whether the resolution plan is in accordance with Sec. 30, sub-section (2), sub-clause (b) and the distribution to the appellant is fair and equitable?

Decision

With regards to the first issue, the Tribunal took note of an NCLAT judgement in which a delay of 43 days in the submission of the resolution plan had been condoned by the authority, stating that "when the resolution plan is on the verge of being accepted or rejected by the CoC, it would not make much difference if a little time is extended." It further relied on the Supreme Court judgement in *Committee of Creditors of Essar Steel India Ltd. vs. Satish Kumar Gupta and Ors*[1]. wherein it had been held that the timeline provided in Sec. 12 is not mandatory and may be extended in certain cases. The tribunal, thus, did not find any issue with the extension of 330 days' time by the AA.

Regarding the second issue, the tribunal relied on the Supreme Court judgement in *Ghanashyam Mishra and Sons Pvt. Ltd. vs. Edelweiss Asset Reconstruction Company Ltd.*[2] which laid down that all dues, if not part of the resolution plan, stand extinguished and no proceedings with respect to them should be continued before the AA grants its approval. Therefore, there is no question of the claim of the appellant still exists pertaining to the pre-CIRP period.

[1] (2020) 8 SCC 531.

[2] (2021) 9 SCC 657.

With respect to the third issue, the tribunal stated that there could be no quarrel between the provisions of the IBC and the aforementioned regulations due to the overriding effect that the IBC has on any law inconsistent with it, under Sec. 238. Therefore, the contention that the resolution plan contravenes the provisions of the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, and hence, is in violation of Sec. 30(2)(e) of the IBC, could be accepted. The tribunal further referred to the Supreme Court judgement *in State Bank of India vs. V. Ramakrishnan and Anr.*[3] as well as in *Lalit Kumar Jain vs. Union of India and Ors.*[4]– in both of these, statutory provisions were held to be overridden by virtue of approval of the resolution plan by the AA. Thus, it was held that the appellant electricity supplier is obliged to reconnect the electricity, as provided in the resolution plan, and he cannot escape this duty by saying that Regulations 4.6.1 and 4.6.4 have not been complied with.

Finally, the tribunal considered the question of whether the distribution to the appellant was "fair and equitable". Herein, the *Committee of Creditors of Essar Steel India Ltd.* judgement was referred to, wherein the Supreme Court clearly laid down the minimum value required to be paid to the operational creditor, as set down in Sec. 30(2)(b). In the same case, the court also held that financial creditors and operational creditors need not be made to pay the same amount percentage-wise. IBC does not contemplate that all creditors be given equal treatment – it is equitable treatment only within the same class. Therefore, the tribunal did not find any substance in the argument that the resolution plan violated Sec. 30(2)(b) of the IBC, and the appeal was ultimately dismissed.

Comment

The NCLAT was right in deciding that the timeline may be extended even after 330 days have passed, as had been held by the Supreme Court in the Essar Steel case. Moreover, it is a settled position of law that dues that are not part of the resolution plan stand extinguished, and claims cannot be made in their regard. This was correctly reaffirmed by the tribunal in this case. The tribunal also took the correct view with respect to the third issue in stating that there can be no contravention of the West Bengal Electricity Regulatory Commission Regulations by the resolution plan since IBC has an overriding effect on any law inconsistent with it. It further upheld the position established in Essar Steel that the IBC does not contemplate that all creditors be given equal treatment; it is equitable treatment only within the same class. Therefore, the tribunal provided a judgement that is good in law, which deals with all the issues extensively and reaffirms settled points of law.

"Ria Goyal

[3] (2018) 17 SCC 394.

[4] (2021) 9 SCC 321.

The operational creditor cannot file an application under Sec. 9 when there is no debt due on the corporate debtor.

MR. C. VIJAYAKUMAR v. M/S. SAHAJ BHARTI TRAVELS

Court	National Company Law Appellate Tribunal, Principal Branch, New Delhi
Judgement Dated	May 26, 2022
Bench	Justice Ashok Bhushan (J), Sheersha Marla (T), Naresh Salecha (T)
Relevant Sections	IBC, 2016 – Sec 8 & 9

Brief Background

An application under Sec. 9 of the IBC was filed by M/s. Sahaj Bharti Travels (Respondent) against HCL Technologies Ltd. (corporate debtor). An order was passed by NCLT, Delhi admitting the application filed by the respondent. The present appeal has been filed by the aggrieved appellant i.e., the corporate debtor, against the said order.

An Agreement dated 19.11.2015 was entered between the parties for transport services to be provided by the operational creditor to the corporate debtor for the purpose of the employees of the Company's commutation from the various points in NCR to all facilities of corporate debtor located in NCR from 20.04.2015 to 30.04.2018. However, the corporate debtor extended it till 31.12.2018.

As per Schedule A of the Agreement, in case the cabs did not run for a minimum of 7000 kilometres, upon being eligible by fulfilling certain pre-conditions mentioned therein, a minimum guarantee amount would be payable by the corporate debtor. Disputes originated over the payment of the minimum guarantee. The corporate debtor offered to pay a sum of Rs. 20,58,818/- The standing offer was set to lapse if the operational creditor did not communicate acceptance within a stipulated time. The operational creditor however requested a sum of Rs. 81,96,237/- followed by a demand notice under Sec. 8 of the IBC being sent to the corporate debtor claiming the total amount of due debt as Rs.3,54,10,565/- The claim was denied by the corporate debtor stating that there exists no subsisting debt on their part. The operational creditor thereafter filed an Application under Sec. 9 of the IBC claiming dues. The AA after hearing the parties by impugned order admitted Sec. 9 application and held that the operational creditor was entitled to claim the minimum guarantee amount. The corporate debtor, being aggrieved by this order, filed the present Appeal.

Issues

(i) Whether there was a pre-existing dispute between the parties prior to the issuance of the Demand Notice under Sec. 8?

(ii) Whether there was a debt due of which default was committed by the corporate debtor entitling the operational creditor to file an application under Sec. 9?

(iii) Whether the correspondences between the parties beginning from an e-mail dated 26.05.2018 to 03.12.2018 proved admission of debt by the corporate debtor of an amount of more than Rs. 1 Lakh which was sufficient to admit Sec. 9 Application?

(iv) Whether the Application filed by the operational creditor was an application as a debt enforcement measure against the solvent company for recovery of a debt and not an Application for any Insolvency Resolution for the corporate debtor?

Decision

The Tribunal, while dealing with the first issue, noted that there was a pre-existing dispute which is supported by materials on the record. It was of the view that the AA erred in rejecting the defence of the Appellant that there was a pre-existing dispute. There being a pre-existing dispute between the parties, the AA committed an error in admitting Sec. 9 Application. Hence, the Tribunal remarked that the impugned order deserves to be set aside on this count alone.

While dealing with the second issue, the Tribunal arrived at the conclusion that there is no debt due on the corporate debtor. Hence, no default can be imputed on the corporate debtor so as to enable the operational creditor to initiate Sec. 9 proceedings. No invoices had been raised with regard to the claim of the Minimum Guarantee, no debt was due and the Application under Sec. 9 was liable to be rejected on this ground also.

As the Tribunal dealt with the third issue, it was of the opinion that the submission of the operational creditor that the corporate debtor has admitted the debt of more than Rs.1 Lakh, hence, admission of the Application is justified and cannot be accepted. There have been categorical denials of the claim of the operational creditor by the corporate debtor as it never admitted any debt. Thus, the submission of the operational creditor that debt is admitted was held to be without any substance.

While dealing with the last issue, the Tribunal remarked that the AA committed a serious error in admitting Sec.

9 Application in the facts of the present case. The tribunal was of the considered opinion that the order of the AA dated is unsustainable. Hence, it was decided that the Application filed by the operational creditor under Sec. 9 deserved to be rejected. The Tribunal allowed the Appeal and set aside the order passed by the AA and rejected the Sec. 9 Application filed by the operational creditor.

Comments

In this case, the AA has followed the law to the letter and there is no fallacy in the judgment. The case reaffirms the procedural framework of IBC under which, if the corporate debtor conveys the existence of a dispute under Sec. 8(2) of the IBC, the operational creditor cannot file for a CIRP application under Sec. 9 of the IBC. Further, a Sec. 9 application cannot be filed by the operational creditor if no debt was due to the corporate debtor.

"Harshita Sharma

The owner of a plot of land cannot cancel a lease deed granted in the favour of the corporate debtor and take possession of the plot of land after the initiation of CIRP and enforcement of moratorium.

MAHARASHTRA INDUSTRIAL DEVELOPMENT CORPORATION v. SANTANU T. RAY, RESOLUTION PROFESSIONAL & ANR.

Court	National Company Law Appellate Tribunal – Principal Branch, New Delhi
Judgement Dated	May 04, 2022
Bench	Justice Ashok Bhushan, Ms. Shreesha Merla (T), Dr. Alok Srivastava (T)
Relevant Sections	IBC, 2016 – Sec. 14

Brief Background

The Appellant had allotted a plot of land to the corporate debtor for which a lease agreement was executed between the two parties on 20.01.2015. Under the lease agreement the license was granted to the corporate debtor for two years subject to the condition that it must complete 20% of the construction within two years from 20.01.2015. A tri-partite agreement was further executed between the appellant, the corporate debtor, and DHFL under which the plot was mortgaged to DHFL and a loan amount of Rs. 7,22,80,214/- was disbursed by the corporate debtor.

On 01.11.2018 a show-cause notice was issued by the Appellant to the corporate debtor as the construction work on the plot had not been completed as per the lease agreement. On 29.01.2019, the Appellant issued a letter to DHFL informing that the Corporate Debtor had committed the breach and the Appellant would be taking possession of the plot. CIRP was initiated against the corporate debtor by an order dated 11.03.2019 on an application filed by an operational creditor – Kay-Bee Foundry Services Pvt. Ltd.

The assignee of DHFL i.e. Asset Reconstruction Company (India) Ltd. filed a Writ Petition in the Bombay High Court challenging the letter of the Appellant dated 29.01.2019 but the same came to be dismissed on 04.11.2019 on the grounds that the lease was liable to be revoked if the corporate debtor had committed default in complying with the terms of the lease agreement. Subsequently, on 08.11.2019 the Appellant issued a notice to the corporate debtor canceling the lease agreement and directing the license holder to vacate the plot. The resolution professional however approached the NCLT requesting it to, *inter alia,* quash and set aside the notice dated 08.11.2019 issued by the respondent and directing the respondent to restrain from terminating the lease agreement dated 21.01.2015. The NCLT vide its order dated 12.04.2021 quashed and set aside the notice dated 08.11.2019 issued by the respondent as null and void and also restrained it from taking any steps in further of the said notice. Aggrieved by the impugned order, the respondent approached the NCLAT.

Issues

(i) Whether after initiation of CIRP and enforcement of 'Moratorium' under Section 14, the Appellant could have cancelled the lease which was earlier granted in favour of the Corporate Debtor and take possession of the plot in question during CIRP?

ii) Whether the Adjudicating Authority had no jurisdiction to entertain the application praying for quashing the Notice dated 08.11.2019?

Decision

The NCLAT held that the appellant was not empowered to cancel the lease granted in favor of the corporate debtor due to the enforcement. Relying on the judgment of the Hon'ble Supreme Court of India in the case of *Rajendra K. Bhutta v MAHADA*, (2020) 13 SCC 208, it observed that the purpose and object of a moratorium are to temporarily freeze all actions as contemplated under section 14 of the IBC to enable the corporate debtor to resolve its insolvency. While Section 14(1)(a) prohibits the institution of suits or continuation of pending suits and proceedings against the corporate debtor, section 14(1)(d) prohibits recovery of any property by any owner or lessor which is occupied by the corporate debtor. This prohibition on action against the corporate debtor is to preserve the status quo as it exists on the date of initiation of CIRP so that all claims against the corporate debtor on the date of initiation can be collated and dealt with to take steps to revive by approving the appropriate resolution plan. Therefore, in the factual circumstances of the present case the appellant could not have taken possession of the leased property by virtue of the restraint under section 14(1)(d), nor could it have cancelled the lease due to the prohibition under section 14(1)(a).

The NCLAT also held that although the NCLT had allowed the quashing of notice dated 08.11.2019, it does not create any fetter of rights on the appellant to pass an order for the breach of terms of the lease until the CIRP is over. The NCLAT relied upon the judgment of

the Hon'ble Supreme Court in *Embassy Property Developments Pvt Ltd v State of Karnataka and Ors,* (2020) 13 SCC 308 and *Tata Consultancy Services Ltd. v SK Wheels Pvt Ltd, Resolution Professional, Vishal Ghisulal Jain*, (2022) 2 SCC 583 wherein it was held that the Adjudicating Authority has no jurisdiction to judicial review of any action taken by the Government or Statutory Authority in relation to matters which is in the realm of public law. It further held that the apprehension of the appellant that if the plot in question is handed over to the successful resolution applicant, the rights of the appellant would be fettered, to be without any basis. This is due to the fact that only the rights and liabilities which the corporate debtor had to the plot could be transferred to the resolution applicant. Thus, the resolution applicant cannot acquire better rights nor can wash out its liability under the lease deed merely on the ground that the resolution plan has been approved.

Comment

The pronouncement of the NCLAT in the instant case has reinforced the scope of moratorium under section 14 of the IBC in the cases where the corporate debtor is in possession of leased land. In doing so the NCLAT has rightly upheld the objective of the moratorium period by ensuring that the assets of the corporate debtor remain preserved during the CIRP process.

An important question for consideration of the NCLAT was in terms of the apprehension of the appellant of the possibility that after the conclusion of the CIRP the land in question may be handed over to the successful resolution applicant, thereby fettering the rights of the original owner. However, the NCLAT has rightly observed that only the rights and liabilities that the corporate debtor has in the plot can be transferred even in the case of a successful CIRP. Thus the original owner will always have the right to deal with the leased land in accordance with its rights after the conclusion of the CIRP.

"Yashaswi Pande

CIFL NEWSLETTER

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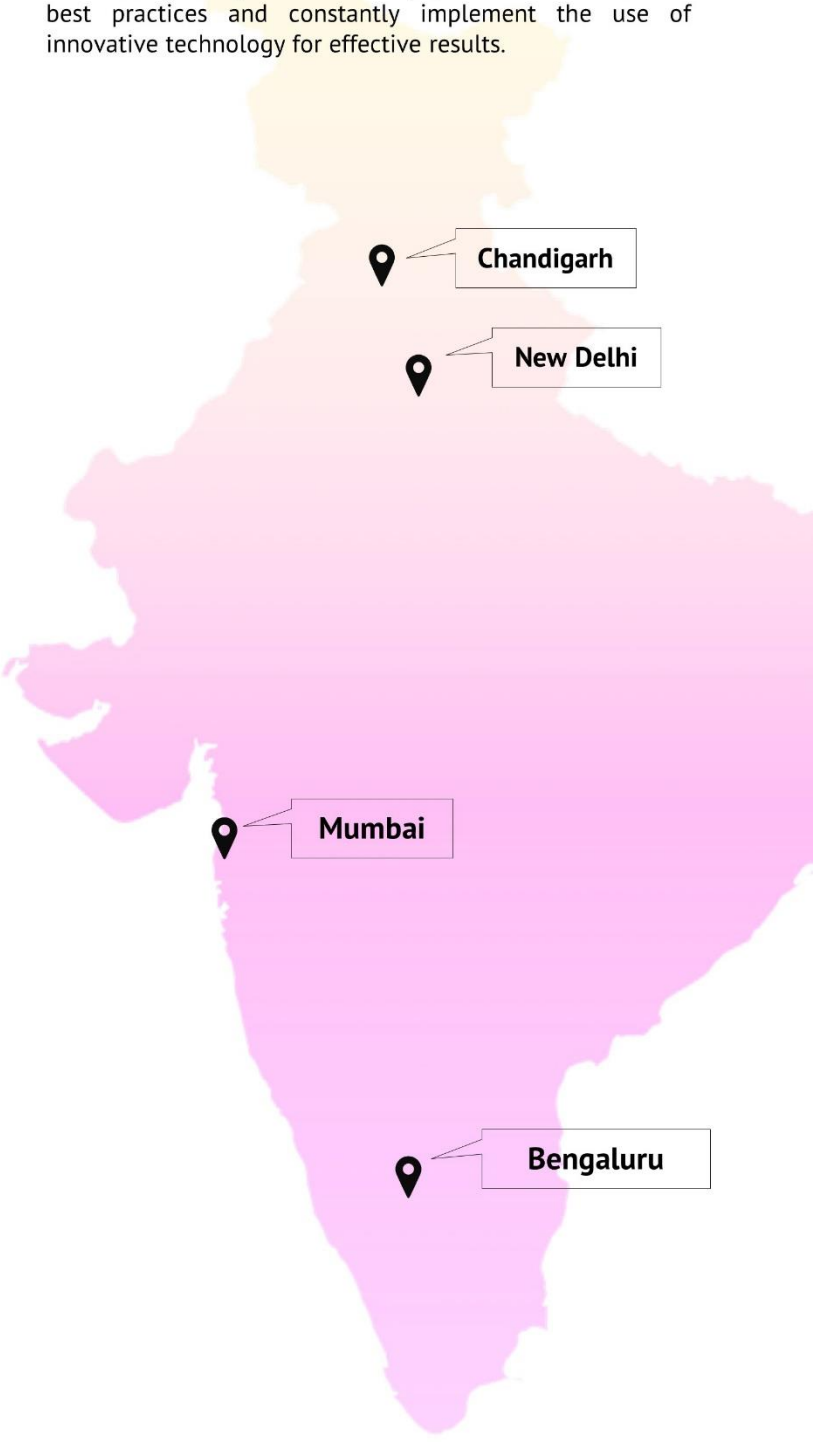

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