CENTRE FOR INSOLVENCY AND BANKRUPTCY STUDIES

NATIONAL LAW UNIVERSITY, JODHPUR

AUGUST 2021 NEWSLETTER

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JUDGEMENTS

I. Kay Bouvet Engineering Ltd. vs Overseas Infrastructure Alliance (India) Private Limited

The Supreme Court in this case dealt with a situation, wherein, initiation of aCIRP is sought under Section 9 of the Insolvency and Bankruptcy Code. 2016 (hereinafter "IBC"), the Adjudicating Authority has the power to reject such an application if a dispute truly exists in fact and is not spurious, hypothetical or illusory.

Besides Section 8 and Section 9 of the IBC, the Court also touched upon the judgment in Mobilox Innovations Private Limited v. Kirusa Software Private Limited, in which the terms "existence", "genuine dispute" and "genuine claim" etc. were interpreted, to derive the conclusion.

II. Pratap Technocrats (P) Ltd. &Ors v. Monitoring Committee of Reliance Infratel Limited &Anr.

The Supreme Court observed that applying residual equity-based jurisdiction while dealing with CoC approved Resolution Plan, amounts to interference in the commercial wisdom of the Creditors. "These authorities (NCLAT and NCLT) cannot enter into the commercial wisdom underlying the approval granted by the CoC to the resolution plan," said the Bench of Justices DY Chandrachud and MR Shah.

The Court highlighted that these authorities are confined by the provisions of Section 31(1) to determining whether the requirements of Section 30(2) have been fulfilled in the plan as approved by the CoC. The court also observed that the IBC establishes rights and duties that are to be carefully regulated and coordinated by the legislation and along with its rules.

III. Dena Bank vs. C. Shivakumar Reddy

A Division Bench of Indira Banerjee and V. Ramasubramanian, JJ. held that there is no bar in law to the amendment of pleadings in an application under Section 7 of the Insolvency and Bankruptcy

Code, 2016 or filing of additional documents apart from those initially filed, at any time until a final order either admitting or dismissing the application has been passed.

The Court also held that an application under Section 7 for imitation of corporate insolvency resolution process against a corporate debtor is not be barred by limitation if there is an acknowledgement of the debt by the corporate debtor before the expiry of the limitation period. Such acknowledgement can be by way of statement of accounts, balance sheets, financial statements and offer of one time settlement.

Moreover, a final judgment and/or decree of any court or tribunal or any arbitral award for payment of money, if not satisfied, would fall within the ambit of a financial debt, enabling the creditor to initiate proceedings under Section 7.

IV. Siva Industries and Holdings Ltd., In re

The Coram of Justice R. Sucharitha (Judicial Member) and Anil Kumar B (Technical Member) in this case noted that the proposed settlement plan for restructuring resembled more to a 'Business Restructuring Plan", and thus based on ambiguity, dismissed the application. The application had originally sought for liquidation of the Corporate Debtor in case of any default in the proposed Settlement Plan.

The Tribunal while rejecting the proposal calling it a "business restructuring plan" rather than a settlement envisaged under section 12 A of the Insolvency and Bankruptcy Code (IBC), held that the terms of the settlement were ambiguous. It stated that, *"There is no final offer made by the promoter of the corporate debtor, and also the acceptance made by the committee of creditors (CoC) in this regard."*

V. Om Logistics Limited v Ryder India Pvt. Ltd.

In this case, it was alleged that the Corporate Insolvency Resolution Process initiated by the parties, was not for the resolution of Insolvency. Instead, the Operational Creditor had used for recovery and got the CIR process started with malicious intent for a purpose other than the resolution of insolvency of the Corporate Debtor, not permissible under the IBC.

The Tribunal was of the view that the IRP for dissolution of the Corporate Debtor 'cannot be accepted since the Liquidation is a pre-requisite to the Dissolution' and in the present case, no order

of Liquidation has been passed due to the absence of any such proposal and non-functioning of the CoC.

The Tribunal was thus of the opinion that, *"After hearing submissions of the Applicant/IRP, perusing his averments and documents placed on record, this Bench is of the view that the prayer made by the IRP for dissolution of the Corporate Debtor cannot be accepted since the Liquidation is a pre-requisite to the Dissolution and in the present case, no order of Liquidation has been passed due to absence of any such proposal and non-functioning of the CoC".*

The Coram further held that *"by exercising our jurisdiction under Section 60(5) of IBC 2016 along with inherent power under Rule 11 of the NCLT Rules, 2016, we hereby terminate the CIR process of the Corporate Debtor with immediate effect and release the Corporate Debtor from the rigours of the CIRP and moratorium".*

<u>OTHER UPDATES</u>

I. Insolvency and Bankruptcy Board of India signs MoU with National Stock Exchange for Research Collaboration

IBBI and NSE inked a Memorandum of Understanding (MoU) on 6th August, 2021 for a research partnership. The collaboration's goal is to establish a robust research environment in the field of Insolvency and Bankruptcy in India.

Speaking on this occasion, Shri Vikram Limaye, MD & CEO, NSE said, "Insolvency and bankruptcy laws play an important role in an economy as they enable efficient and orderly allocation of productive resources and provide an effective resolution mechanism for debtors and creditors. We are happy to collaborate with IBBI for developing an extensive research framework in the field of insolvency and bankruptcy in India".

II. RBI Governor calls for expediting resolution of CIRP cases under IBC

Shaktikanta Das, Governor of the Reserve Bank of India, has highlighted the need to reduce the duration for resolving default cases under the IBC.

He recognized that the restoration under the current system is more extensive than previous regimes i.e. restoration rate under the SARFAESEI regime was at 20%, but it is now about 40% under the

IBC. He said that the recovery rate is higher under IBC as it is judicially reviewed by Adjudicating Authorities. It is necessary that the amount of time prescribed should be decreased for which the government has taken steps to simplify and rationalize the system. However, when it comes to recuperation, IBC is significantly superior to The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

III. The Central Government has notified the Insolvency and Bankruptcy Code Amendment Act, 2021

On August 12, 2021, the Central Government has notified the Insolvency and Bankruptcy Code Amendment Act, 2021 which has brought Pre-packaged Insolvency Resolution Process for MSMEs. The Act repeals the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 and amends the provisions of the IBC Act, 2016. It shall be deemed to have come into force on the 4th day of April, 2021.

There has been a demand for offering a simplified version of IBC that saves time and cost of bankruptcy proceedings for small businesses in distress. Accordingly, an Ordinance was promulgated in April this year that offered what is called a 'pre-packaged' or pre-pack resolution scheme. It is an informal way of stitching together a corporate rescue plan for which a seal of approval from a tribunal will be sought subsequently. The IBC (Amendment) Bill, 2021 seeks to replace this Ordinance.

The Ordinance said that the government felt it was expedient to provide an "efficient alternative insolvency resolution process for corporate persons classified as MSMEs" under the IBC. The idea was to "ensure quicker, cost-effective and value maximising outcomes for all the stakeholders, in a manner which is least disruptive to the continuity of their businesses and which preserves jobs.

IV. A Company can run as a going concern in liquidation: NCLAT

A company can run typical operations or as a "going concern" even whether it is in the method of being wound up in an administered sale, mentioned a current order by a chapter appeals court docket, boosting restoration prospects for lenders that need to maximise worth on soured loans.

The order was handed in the case of M/s Mohan Gems & Jewels Pvt Ltd versus Vijay Verma &Anr stating that the sale of company debtor as a going concern throughout the liquidation course is legitimate beneath the IBC.

The NCLAT mentioned that the NCLT has not appreciated the ratio laid down by the Supreme Court that the liquidation of the company is to be seen as a final resort and each try ought to be made to revive the company and to proceed as a 'going concern'.

"*We are of the view that the sale of the 'Corporate Debtor Company' was carried out by the liquidator in accordance with the Regulations*," NCLAT judges mentioned. They also observed that "*The ground reality is if there is value in the company and if the company can be run as a going concern, people will come forward to take it as a going concern*"

V. The Ministry of Corporate Affairs (MCA) is working to issue a code of conduct for creditors under the IBC.

This comes after a Parliamentary panel flagged the "disproportionately large and unsustainable 'haircuts' taken by the financial creditors over the years". There were instances of creditors talking more than 90 percent haircuts.

The code will be formulated through a collaboration with the Indian Banks' Association, the Reserve Bank of India and the Department of Financial Services.

VI. The 32nd Standing Committee on Finance has brought out a report titled 'Implementation of Insolvency and Bankruptcy Code- Pitfalls and Solutions'

This report is brought out by the Standing Committee on Finance chaired by Jayant Sinha. The recommendations made by the committee include

- a professional self-regulator for RPs that function like the Institute of Chartered Accountants of India (ICAI) should be put in place;
- the formulation of guidelines by IBBI for the selection of RPs by the CoC along with a professional code of conduct for the COC;
- NCLT judicial members should be at least Hon'ble High Court judges;

- Dedicated benches of NCLT solely for IBC should be created and the institutional capacity of NCLT benches should be enhanced;
- Specialised benches for sectors such as MSMEs;
- Amendment of the IBC to clarify that the resolution plan can be achieved through any means prescribed under Regulation 37 of CIRP regulations; and
- Adoption of the provisions of the cross-border insolvency framework should be expedited.