CENTRE FOR INSOLVENCY AND BANKRUPTCY STUDIES

NATIONAL LAW UNIVERSITY, JODHPUR

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JUDICIAL PRONOUNCEMENTS

I. SUPREME COURT

a. TATA Consultancy Services Limited v. Vishal Ghisulal Jain, Resolution Professional, SK Wheels Private Limited, Civil Appeal No 3045 of 2020

In this case, the CD ["**CD**"] instituted a miscellaneous application before the NCLT ["**National Company Law Tribunal**"] under Section 60(5)(c) of the IBC ["**Insolvency and Bankruptcy Code, 2016**"] for quashing of a contract termination notice. The NCLT, while granting an ad-interim stay observed that prima facie it appeared that the contract was terminated without serving the requisite notice of thirty days. NCLAT ["**National Company Law Appellate Tribunal**"] dismissed the appeal filed against this order.

In appeal, these issues were raised: (i) Whether the NCLT can exercise its residuary jurisdiction under Section 60(5)(c) of the IBC to adjudicate upon the contractual dispute between the parties; and (ii) Whether in the exercise of such a residuary jurisdiction, it can impose an ad-interim stay on the termination of the Facilities Agreement.

The Supreme Court reiterated that the NCLT can exercise its residuary jurisdiction under Section 60(5)(c) of the IBC to adjudicate contractual disputes between parties provided such dispute has arisen in relation to the insolvency of the CD. Even if the contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract only if it is central to the success of the CIRP, the court added.

b. Electrosteel Castings Ltd. v. UV Asset Reconstruction Company Ltd. & Ors.

Hon'ble Supreme Court held that the residuary jurisdiction of the NCLT cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the CD.

The NCLT does not have any residuary jurisdiction to entertain the present contractual dispute which has arisen dehors the insolvency of the CD. In the absence of jurisdiction over the dispute, the NCLT could not have imposed an ad-interim stay on the termination notice. The NCLAT has incorrectly upheld the interim order of the NCLT.

The Court further held that even if the contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract only if it is central to the success of the CIRP. Crucially, the termination of the contract should result in the corporate death of the CD.

The Court also held that in any event, the intervention by the NCLT and NCLAT cannot be characterized as the re-writing of the contract between the parties. The NCLT and NCLAT are vested with the responsibility of preserving the CD's survival and can intervene if an action by a third party can cut the legs out from under the CIRP.

II. HIGH COURT

a. Dewan Housing Finance Corporation Limited v. Union of India, Interim Application (ST.) No. 14632 of 2021 (Intervention Application) along with Piramal Capital & Housing Finance Limited v. Central Bureau of Investigation, EO-1, Delhi and Ors., WP No. 3221 of 2021

In this case, the Bombay High Court delt with the issue that "*Whether Section 32(1)(a) of IBC lays down a direction that, CD, would be absolved of all criminal offences committed prior to commencement of CRIP, from the date of approval of Resolution Plan, although, appeals against Section 31 order of the IBC were pending before the NCLAT*?"

The Court noted that the resolution plan resulted in change of management of the CD and thus there is no reason why immunities under Section 32A of IBC can be denied to CD. Hence, the petitioner is discharged from the pending criminal case.

b. Credit Suisse AG v. SpiceJet Limited.

In this case, a petition was filed by Credit Suisse AG, according to which SpiceJet had reached an agreement with SR Technics for MRO services for a period of 10 years in November 2011. SpiceJet argued that the documents relied upon by the petitioner were not properly stamped in accordance with the requirements of the Indian Stamp Act, and therefore couldn't be relied upon to establish a debt in an Indian Court.

The Madras High Court has directed SpiceJet Limited to wind up its operations after the airline failed to make payment of over $24 million to SR Technics for maintenance, repair and overhauling of aircraft engines, modules, components, assemblies and parts. The court directed the official liquidator to take over assets of the airline. The operation of the order, however, is conditionally stayed for a period of three weeks, allowing SpiceJet to lodge an appeal. Since SpiceJet failed to pay the debt demanded under said notice within the three weeks period, it was deemed to be unable to pay its debts as per Section 434 of the Companies Act.

III. NCLAT

a. Mr. Aseem Srivastav v. ICICI Bank Limited

In this case, the NCLAT delt with the issue that whether filing of an Application under Section 7 of the IBC despite opposition by all other creditors and during pendency of restructuring proposal is unsustainable in law. Around 5 banks (FCs) submitted that they were interested in restructuring outside the ambit of IBC and that it was much more beneficial to the proceedings under IBC. On the other hand, one financial creditor wanted to proceed under Section 7 of IBC. However, the appellant was unable to convince the NCLAT that during the pendency of restructuring proposal outside the purview of IBC, the Application under Section 7 of IBC is unsustainable in law.

Therefore, the NCLAT held that since Section 7(4) of the IBC provides that the Adjudicating Authority shall within 14 days of receipt of the Application ascertain the existence of default from the records of an information utility or on the basis of other evidence furnished by the Financial Creditor passed an order under Section 7(5). Section 7 (5) provides that where the Adjudicating Authority is satisfied that a default has occurred. Thus, the Adjudicating Authority is not obliged to consider that restructuring outside the purview of IBC would be beneficial to the FCs.

b. Shailendra Singh v. Nisha Malpani, NCLAT Company Appeal (AT)(INS) No.945 of 2020

In this case the appellant has submitted that he is an Advocate by profession who was appointed by the erstwhile IRP for the CD in IB-560 of 2017. He was replaced by the Respondent as RP. The appellant further submitted that he was very diligent in his work and that his bills were pending as he was replaced by the CoC. The application for confirmation of Respondent was filed before the 'Tribunal" and later the appellant to clear the professional dues of the Appellant along with litigation cost of Rs.1 lakh and that the Respondent, before the Tribunal made an assurance of taking necessary steps to pay the arrears of fess to him and the Tribunal had directed the Respondent to pay the arrears of fee within two days. However, even after the lapse of 3 ½ months of passing of the order by the Tribunal, the Respondent did nothing, although a direction was issued to do the needful within two days. Hence, the Appellant was constrained to file Contempt Application No. A-01(PB) of 2020 under Section 425 of the Companies Act, 2013 r/w Section 12 of the Contempt of Courts Act, 1971 and Rule 11 of

NCLT Rules, before the Tribunal for initiating contempt proceedings against the Respondent for wilful disobedience of the Impugned Order.

NCLAT held that the 'Tribunal', i.e., NCLT, and the 'Appellate Tribunal', that is, NCLAT, have the same 'jurisdiction', 'powers' and 'Authority' in respect of contempt as the 'High Court' viewed in that perspective, the conclusions arrived at by the Adjudicating Authority (National Company Law Tribunal) in the impugned order by making it clear that the IBC is devoid of contempt of jurisdiction and thereby dismissing the application, leaving it open to the Appellant/Applicant to seek remedy through recourses available, are clearly unsustainable in the eye of Law and the same is interfered with by this 'Tribunal' in furtherance substantial cause of justice, sitting in 'Appellate Jurisdiction'.

c. Jitender Arora RP M/s. Premia Projects Ltd. Vs. Tek Chand

A joint CIRP would be possible only if there is an application for admission of CIRP under the IBC against the landowning entity and there is a strong case for undertaking joint CIRP. If a CD has intricate financial relationship with another company which is controlled in an overwhelming manner by the same set of directors, as the CD and their businesses are inter-related, intertwined and interwoven, it stands to reason that such companies should be looked at jointly, for matters related to insolvency resolution, as the financial revival of one company will be closely linked to the financial health of the other company.

IV. NCLT

a. Jai Balaji Industries Limited v. BST Infratech Limited

In this case there was a settlement between the CD and the OC which stipulated that the OC shall not proceed under Section 9 of IBC against the CD in return the CD will make the payment in form of monthly installments. However, the CD failed to honour that settlement. Thereafter, the CD pointed out that the OC should initiate "fresh proceeding" as per the settlement terms. CD also initiated a dispute against the OC with respect the amount of claim filed by the OC. The NCLT in this case noted that Settlement Agreement indeed been a clever handiwork of a draftsman, especially designed to take the OC fold and avoid the imminent Court orders against the CD, without even paying a penny after the settlement. Specific use of selected words "fresh notice" and "fresh proceedings" visibly and clearly expose the design of the CD intending to put the OC on the long track and frustrate the claim/proceedings pending before this Adjudicating Authority, which however cannot be allowed to happen in these proceedings.

NCLT found that none of the Judgments cited by the CD help it in any way, either as regards its claim of pre-existing disputes or as regards seeking permission from the Adjudicating Authority for filing an application in case of failure of the Settlement, because it was not a "withdrawal simplicitor" but had been allowed on the joint request of counsel for the parties pursuant to the Settlement Agreement. NCLT finally held that the CD failed to comply with the terms settled between the parties is a proved default on its part and its failure to pay the installments, the right to sue rightly accrued in favour of the OC. Therefore, the NCLT admitted the petition.

b. Magnate Industries LLP v. Safal Developers Pvt. Ltd.

The NCLT Mumbai Bench held that as document is undated, unstamped and unregistered it cannot be relied upon by this Tribunal as a valid document to proceed against the Respondent as has been laid down by the Hon'ble Supreme Court in M/s N.N. Global Mercantile V. M/s Indo Unique Flame Ltd & Others [(2021) 4 SCC 408]. The refundable security deposit of Rs.25 crore arranged by 'the Joint Developer' petitioner through a third entity cannot constitute a financial debt as per section 5(8) of the Code owed by 'the Developer' respondent to the petitioner. It held that for dishonouring of the cheques, there is a specific remedy available to the petitioner under section 138 of the Negotiable Instrument Act 1881. The petitioner chose not to proceed against the respondent in this regard. The mere fact of dishonouring of cheques, by itself, cannot be construed as existence of financial debt and default so as to admit a petition under section 7 of the IBC-2016.

OTHER UPDATES

a. Bajpai Led Committee Suggests Standard Framework, Time, Cost Data Tracking to Improve IBC.

A working group headed by GN Bajpai has suggested that the Insolvency and Bankruptcy Board of India come up with a standardised framework with a real-time data bank, with data on time, cost and recovery rates together with macroeconomic indicators to assess the success of the five-year-old law and improve its implementation. The group said in a report that resolution of the distressed asset remains the first objective of the IBC, followed by promotion of entrepreneurship, availability of credit and balancing the interests of stakeholders. It said reliable real-time data is essential to assess the performance of the insolvency process, and suggested that the IBBI consider including quantitative data on cost indicators such as court and bankruptcy authority fees, resolution professional's fees, asset storage and preservation

costs in its quarterly updates in line with international best practices. The group also recommended a national dashboard of insolvency data by using the existing data sources to the extent possible, along with specific insolvency indicators which the IBBI reports on a quarterly basis.

b. Mr. Sandip Garg takes charge as Executive Director, IBBI

Mr. Sandip Garg took charge as Executive Director, Insolvency and Bankruptcy Board of India (IBBI) in New Delhi today. Immediately before joining IBBI, he was serving as Commissioner (Exemptions), Income Tax, Pune.

c. Asset reconstruction companies must be permitted to participate as resolution applicants.

An RBI expert committee has recommended that asset reconstruction companies ["ARCs"] be permitted to participate as resolution applicants under the IBC. This means ARCs can buy stressed assets of failed companies. Short of taking ARCs out of the ambit of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act and of RBI's regulatory ambit, this would be an optimal solution to the present problem of ARCs not being able to resolve bad loans in a holistic fashion.

d. RBI's application initiating insolvency proceedings against Reliance Capital Ltd. admitted.

The National Company Law Tribunal, Mumbai on Monday admitted the Reserve Bank of India's application initiating insolvency proceedings against Anil Ambani-owned Reliance Capital Ltd. The bench, presided over by Pradeep Narhari Deshmukh and Kapal Kumar Vohra, confirmed Nageswar Rao's appointment as the administrator. It also affirmed the initiation of the moratorium period. Creditors of the company may submit their claims with proof on or before December 20, 2021 to the Administrator. Financial creditors may submit their claims with proof by electronic means only. Other creditors may submit their claims with proof in person, by post or by electronic means.

e. No immunity from IBC of state-owned discoms.

According to the power ministry, State-owned discoms (electricity distribution companies) have no immunity from corporate insolvency proceedings and there is no conflict between the IBC of 2016 and the Electricity Act 2003 on resolution of monetary claims.

These views of the ministry gives debtors a fresh legal ammunition for recovering dues. The issue had arisen after the Tamil Nadu government wrote to the power ministry, saying that the provisions of IBC insolvency do not apply to discoms since they were discharging public functions as an extension of the state government. It also said there was a conflict between the IBC and the Electricity Act.

f. IBBI tweaks stakeholders' list filing format in the liquidation process.

Insolvency regulator IBBI has altered the format of filing of stakeholders' list in a liquidation process. With the changed format, liquidators need not furnish stakeholders' personal information such as PAN, Aadhaar number and other details with the electronic platform of the Insolvency and Bankruptcy Board of India (IBBI). IBBI has said that it has come to its notice that in few instances, the details such as Aadhaar, PAN Card are being filled and such information being sensitive personal information is prone to misuse and not to be revealed on public platforms.

g. Public comments invited on cross-border insolvency framework

The Ministry of Corporate Affairs has invited public comments on the proposed legal framework for cross-border insolvency under the IBC. Suggestions and/or comments on the draft Part Z (recommended for incorporation in the IBC by the Insolvency Law Committee) and the modifications proposed must be submitted by December 15.

In an attempt to address the shortcomings of the present cross-border insolvency mechanism, or the lack thereof, India has released a set of draft guidelines containing a specific chapter i.e., Part Z on cross-border insolvency. The applicability of the draft chapter is limited to corporate debtors and the same does not extend to individual debtors and personal insolvency. The requirement of reciprocity is captured in the draft chapter, therefore it would only be applicable to those foreign countries which have also adopted the UNCITRAL Model Law into their domestic legal framework. Two types of foreign proceedings are described in the draft chapter, which creates a distinction between foreign main proceedings and foreign non-main proceedings. In that context, a foreign main proceeding refers to a foreign proceeding taking place in the State where the corporate debtor has the centre of its main interests. Whereas, a foreign non-main proceeding means a foreign proceeding, other than a foreign main proceeding, which takes place in a State where the corporate debtor has an establishment. Under Section 14 of the draft chapter, guidance is provided for determination of COMI. It

provides for a prima facie presumption that the corporate debtor's registered office is its COMI, unless there is proof to the contrary.

h. RBI introduces internal ombudsman mechanism for select NBFCs

The Reserve Bank of India on Monday introduced the Internal Ombudsman mechanism for select non- banking finance companies. "the Reserve Bank...has directed Deposit-taking NBFCs (NBFCs-D) with 10 or more branches and non-deposit taking NBFCs (NBFCs-ND) with asset size of ₹ 5,000 crore and above having public customer interface to appoint Internal Ombudsman (IO) at the apex of their internal grievance redress mechanism within a period of six months from the date of issue of the direction."

NBFCs including stand-alone primary dealer, NBFC-Infrastructure Finance Company, core investment company, Infrastructure Debt Fund - NBFC; NBFC – Account Aggregator; NBFCs under Corporate Insolvency Resolution Process; NBFCs in liquidation and NBFCs having only captive customers have been excluded from the directive.