CENTRE FOR INSOLVENCY AND BANKRUPTCY STUDIES

NATIONAL LAW UNIVERSITY, JODHPUR

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JUDGEMENTS/JUDICIAL PRONOUNCEMENTS

SUPREME COURT

I. Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited & Anr.

Order dated – 9th Sept 2021

Summary: - The issue involved in this case was that whether a resolution applicant can withdraw a resolution plan after it has been approved by the Committee of Creditors (CoC).

The Supreme Court held that the Resolution Plans are not in a nature of a traditional contract per se, and that the IBC framework does not enable withdrawals or modifications of Resolution Plans, once they have been submitted by the RP to the Adjudicating Authority after their approval by the CoC. It reemphasized that the speed of resolution as contemplated in the IBC is sacrosanct. Further, resolution by itself is not the goal of the IBC but resolution within the specific timeframe is in the essence of the IBC and both these aspects have to go together for a successful resolution. Therefore, endeavour should be made to complete the CIRP within a period of 330 days and the timeline should be treated as a norm and not the exception. The Apex Court further requested the NCLT and the NCLAT to refrain from adjournments and strive to follow the timelines laid down under the IBC as such inordinate delays result into commercial uncertainty, degradation in the value of the corporate debtor and makes the insolvency process inefficient and expensive.

The Apex Court concluded with the following observation:

"We urge the NCLT and NCLAT to be sensitive to the effect of such delays on the insolvency resolution process and be cognizant that adjournments hamper the efficacy of the judicial process. The NCLT and the NCLAT should endeavor, on a best effort basis, to strictly adhere to the timelines stipulated under the IBC and clear pending resolution plans forthwith. Judicial delay was one of the major reasons for the failure of the insolvency regime that was in effect prior to the IBC. We cannot let the present insolvency regime meet the same fate".

NCLAT

I. Air Travel Enterprises India Ltd v. Union Bank of India & Ors.

Order dated – 9th Sept 2021

Summary: - In this case, the appellant was a major shareholder of the corporate debtor company, which had acquired financial assistance from the State Bank of India, Union Bank of India and the Bank of Travancore. The outstanding debt of the Corporate Debtor was payable by 2022-23. Meanwhile, on September 5, 2019, the parties signed an OTS agreement, which was approved on November 27, 2019. Having agreed to the OTS, without giving sufficient time, the Union Bank of India filed the application under Section 7 of the Code, which was admitted by the Adjudicating Authority. Therefore, the present appeal was filed under Section 61 of IBC against the Adjudicating Authority's order of admission of a Section 7 application.

The NCLAT, in this case, held that the promissory notes and One Time Settlement (OTS) agreements entered into by the parties with the promise to pay the amount within the given time frame shall be constituted as an "acknowledgment of debt". Hence, the application filed by the financial creditor under Section 7 would not be barred by Limitation. However, despite this, owing to the difficulties faced by the corporate debtor due to the pandemic and in the interest of justice, the NCLAT decided to give additional time to the corporate debtor to settle the matter with the financial creditor. It was directed that in the event of failure to settle the dues as agreed by the OTS agreement within 6 months from the date of order, the banks were at liberty to take appropriate steps for recovery.

II. M/s. Dynamic Engineers Ltd. v. M/s. Muhlenbau Equipments Private Limited

Order dated - 7th Sept 2021

Summary: - In this matter, the Adjudicating Authority denied the Operational Creditor's application under Section 9 of the IBC with observations to settle the disputes between the parties. Despite the Corporate Debtor's failure to appear before the Adjudicating Authority and to respond to the Operational Creditor's demand notice, the Adjudicating Authority rejected the Operational Creditor's application and ordered the debtor to settle the Appellant's claim within three months. Meanwhile, the corporate debtor intimidated the operational creditor to drop the application in order to receive a Form C for completion of the work.

The Appellate Tribunal held that the payment is an operational debt under section 5(21) of the Code and the corporate debtor has committed a default. It further observed that the Adjudicating Authority ought not to have directed the respondent to settle the claim of the petitioner. It is settled law that when a debt and default is proved, the Adjudicating Authority has to admit the application and initiate the corporate insolvency resolution process against the corporate debtor.

III. Sunil Kumar Agrawal v. Committee of Creditors, KPG International Pvt. Ltd. & Anr.

Order dated – 7th Sept 2021

Summary: - Modern Credit Private Limited filed an Insolvency Application against the Corporate Debtor i.e. KPG International private Limited and Mr. Sunil Kumar Agrawal was appointed as Interim Resolution Professional. The Resolution Professional filed an application under Section 12 read with Section 60(5) of the Code and Regulation 40(C) of the IBBI Regulations 2016, for exclusion of Covid-19 period and extending the CIRP under the code. The 180 days' time of the Corporate Insolvency Resolution Process ended during Lockdown period i.e. on 27.07.2020. So, it was prayed that, as per Regulation 40(C) of the IBBI Regulation 2016, the total period of 221 days may be excluded. The Adjudicating Authority allowed the application but excluded only the period commencing from 25.03.3020 to 30.06.2020 i.e. 98 days on the ground of Lockdown imposed by the Central Government as well as State Government while calculating the total period of CIRP.

The Appellate Tribunal relied on the IBBI's Press Release dated 29.03.2021, which provided for the exclusion of the Covid-19 period from the resolution process, to allow the exclusion of 221 days as against the 98 days for calculating CIRP time-limit.

IV. Jayesh N Sanghrajka v. The Monitoring Agency (NCLAT, New Delhi)

Key observations in the decision:

Order- 20th September 2021

An appeal was filed by the Resolution Professional of the Corporate Debtor- 'Ariisto Developers Pvt. Ltd.' assailing an order passed by the NCLT, Mumbai Bench whereby while approving the Resolution Plan submitted by Successful Resolution Applicant- 'Prestige Estates Projects Ltd.', it had disagreed with the with the Committee of Creditors(CoC) which had approved 'success fees' to the Resolution Professional of an amount of Rs.3 Crores.

The Court held that if the resolution professional seeks to have a success fee at the initial stage of the CIRP, it would interfere with his independence, which can be at the cost of the corporate debtor. If success fee is claimed when the resolution plan is going through or after it is approved, it would be in the nature of gift or reward. When the fees have to be on the basis of the case and work performed or to be performed, the reasonability or otherwise would be justiciable. "'Success fees,' which is more in the nature of contingency and speculative, is not part of the provisions of the IBC and the Regulations and the same is not chargeable." The NCLAT has rightly held that the provisions

regarding charging of success fee are not commercial decisions of the CoC and can be looked into by the NCLT.

V. Telangana State Trade Promotion Corporation v. AP Gems & Jewellery Park Private Limited & Anr (NCLAT, Chennai)

Order dated- 21st September 2021

The Court held that the financial creditor's Managing Director was also a Director of the corporate debtor. Moreover, its nominee director advised the FC in matters relating to the corporate debtor. The Articles of Association pointed out that action relating to significant matters ought to be taken only by affirmative vote of three or more Directors and in the qualified majority, minimum one Director is to be nominated for inclusion. The corporate debtor clearly acts on the advice, direction and instructions of the appellant in its normal business affairs. As such, the appellant squarely comes within the ambit of related party as per Section 5(24)(f) and ought to have been excluded from the composition of the Committee of Creditors (CoC).

In matters where the resolution professional has to determine the constitution of the CoC in relation to the issue of 'related party', it becomes imperative that she analyses the articles as well as inter se management participation agreements of the corporate debtor. The Supreme Court in the case of *Arcelor Mittal India Private Limited v. Satish Kumar Gupta* held that *so long as management or policy decisions can be, or are in fact, taken by virtue of shareholding, management rights, shareholders agreements, voting agreements or otherwise, control can be said to exist*. It is also important to read the observations in the case of *Phoenix ARC Pvt Ltd v. Spade Financial Services Ltd & Ors.*

NCLT

I. Centralised Business Solutions Pvt. Ltd. and Anr. Vs. Chandrali Builders and Developers Pvt. Ltd.

Order dated – 9th Sept 2021

Summary: - Centralized Business Solutions Pvt. Ltd. (OC) filed this application to begin CIRP against M/s Chandrali Builders and Developers Pvt. Ltd. under Section 9 of the Code (CD). In this case, the CD addressed the OC, requesting project finance of Rs. 5 crores from the State Bank of India for one of its projects in West Bengal, as it had no significant presence in the state. As a result, the OC reached a verbal arrangement with a Key CD director. In this application, the OC claimed that the CD owed

it Rs. 15 lakhs + GST for " Professional services performed towards Administrative Approval of Bank Finance." The OC said that the professional fee was justified since it had meticulously spent time securing Administrative Approval of bank finance for CD's project.

The Appellate tribunal asked the OC to clarify the reported service (Administrative Approval of Bank Finance) and enquired whether the OC was a CA/CS/Cost Accountant during the proceedings. The OC refused to provide the requested clarifications, claiming they were neither CA/CS or Cost Accountants. The Appellate tribunal pointed out that there is no such thing as "obtaining Administrative Approval of Bank Finance," and that loan applications are approved based on the Loan Applicant's eligibility, as well as the criteria and conditions set forth by the Financial Institution. In such cases, the Bench further stated that no middle-man jobs are authorised. As a result, the Appellate tribunal denied the application on the grounds that, first, the service described by the applicant did not exist, and, second, the application was based solely on a verbal agreement.

II. Kishore K. Lonkar vs. Hindustan Antibiotics Ltd.

Order dated – 6th Sept 2021

Summary: - Mr, Kishor K. Lonkar (Operational Creditor) filed a petition against M/s. Hindustan Antibiotics Limited (Corporate Debtor) under section 9 of the code praying for an order of initiation of CIRP against the corporate debtor for resolution of an "Operational debt" of an amount of Rs. 16,80,877/- being the service benefits payable to the petitioner on his superannuation. The corporate debtor resisted the admission of the company petition on the grounds that no CIRP can be ordered against the corporate debtor which is a government company; secondly, the Corporate Debtor had offered payment of gratuity amount to the operational creditor, but he had not come forward to take it; and thirdly, the operational creditor had obtained an order for payment of gratuity from the Gratuity Commissioner and therefore the remedy for the operational creditor was to have that order executed. The Adjudicating Authority held that the given amount was due towards "gratuity", "leave encashment", and "LTC", on account of superannuation and this amounts to "service benefits" and not services. Hence, this will not qualify under the definition "Operational Debt". Moreover, this amount was not due towards "salary" for the service rendered by him to the corporate debtor while he was in service. The Bench reiterated that though the service benefits accrue out of rendering service but the intention and object of code is "resolution" and not "recovery". The words "goods" and "services" used in the definition of "Operational debt" cannot be stretched to service benefits arising

out of service. Therefore, the adjudicating authority dismissed the company petition as the amount claimed by the petitioner does not qualify as on "Operational Debt".

III. Pama Engineer Services v. Methra Industries India Pvt Ltd.

Order dated- 20.09.2021

Summary-This application was filed by the OC on 18.08.2021 under Section 9 of the Code, in relation to a payable sum of Rs. 32,90,685. The main query arose out of the maintainability of the application, since the pecuniary jurisdiction of the Tribunal had already been increased from Rs. 1 lakh to Rs. 1 crore by the notification dated 24.03.2020. The applicant stated that the Demand Notice under Section 8 was issued to the CD on 04.02.2020, on the basis of which the application gained maintainability.

The application was dismissed for lack of pecuniary jurisdiction, since the aforementioned notification came into effect on 24.03.2020, and the Tribunal explained that the date of filing of the application was of substance in this respect and not the date of issuance of the Demand Notice. Therefore, the Court held that date of filing is imperative in respect of increased pecuniary jurisdiction of the Tribunal.

OTHER UPDATES:-

I. Justice Venugopal appointed as third acting Chairperson of NCLAT

On 11th September, Justice M Venugopal was appointed as the Acting Chairperson of the National Company Law Appellate Tribunal (NCLAT), as the absence of a permanent Chairperson since the last 18 months had led to serious hampering in the working of NCLAT. This is the third time in a row that an Acting Chairperson is at the helm of the NCLAT, which is handling several crucial appeals related to matters under the insolvency and competition laws, after the retirement of Chairperson Justice S J Mukhopadhaya on March 14, 2020.

The NCLAT was constituted under Section 410 of the Companies Act, 2013 for hearing appeals against the orders of the National Company Law Tribunal (NCLT). It is also an appellate tribunal for hearing appeals against the orders passed by NCLT under the IBC and by IBBI. It is also the appellate tribunal to hear and dispose of appeals against any direction issued or decision made or order passed by the Competition Commission of India (CCI).

II. Amendment to the IBBI (Online Delivery of Educational Course and Continuing Professional Education by Insolvency Professional Agencies and Registered Valuers Organisations) Guidelines, 2020

Taking cognisance of the prevailing uncertainties caused due to the pandemic, the insolvency regulator IBBI has now allowed online delivery of educational course and professional development sessions on Insolvency and Bankruptcy Code (IBC) to continue till December 31 this year. The validity of these guidelines is due to end on September 30, but now the IBBI has extended the validity of its 2020 issued guidelines on online delivery of educational course and continuing professional education till December 31, 2021.

This move will benefit thousands of insolvency professionals (IPs) as well as valuation professionals who have to undertake continuing professional education from Insolvency Professional Agencies (IPAs) and Registered Valuers Organisations (RVOs).

III. NCLAT cannot condone a delay of more than 15 days in an appeal against an NCLT decision.

In the case of National Spot Exchange v. Dr. Anil Kohli, the Supreme Court ruled that the NCLAT can only excuse a delay of up to 15 days, as specified in the proviso to Section 61(2) of the IBC. *"Considering the statutory provisions that specify that a delay of more than 15 days in filing an appeal is uncondonable, the same cannot be condoned even in the exercise of powers under Article 142 of the Constitution,"* the Court said.

As per Section 61(2) of the Insolvency and Bankruptcy Code, all appeals from the NCLT to the NCLAT must be filed within 30 days. However, a proviso to Section 61(2) allows NCLAT to excuse a 15-day delay over 30 days if it finds that there was a sufficient justification for failing to file the appeal within the 30-day limitation period. As a result, an appeal must be filed within 45 days following the NCLT judgement.

IV. NCLT allows initiation of personal insolvency against Videocon promoter Venugopal Dhoot.

Dhoot had provided personal guarantees for loans obtained under multiple agreements between SBI and Videocon Industries in 2012, which were invoked in the event of defaults. Dhoot received the demand letter from SBI in July 2020 and in August 2020, an insolvency petition was filed.

The Supreme Court, in May 2021, confirmed the laws allowing creditors to proceed against personal guarantors, including Dhoot and numerous other high-profile businesspeople. After the Ministry of

Corporate Affairs (MCA) received the permission to freeze his assets, the National Company Law Tribunal (NCLT) Mumbai then approved the request of State Bank of India (SBI) for personal insolvency case against Videocon Industries promoter Venugopal Dhoot. An interim moratorium has also been implemented over all of Dhoot's personal debts with effect from Sept.

V. The Insolvency and Bankruptcy Board of India (IBBI) has notified the IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2021. Highlights of the amendment are:

a. The committee of creditors (CoC) (collectively and individually) shall discharge its functions in compliance with the guidelines as may be issued by the IBBI (Regulation 17(1A)).

b. Modifications in the following permitted, **but not more than once**:

- Invitation for expression of interest (Regulation 36A (4A)),
- Request for resolution plan (RFRP) (Proviso, Regulation 36B(5)),
- Evaluation Matrix (Proviso, Regulation 36B(5)), and
- Resolution Plan (if envisaged in the RFRP) (Regulation 39(1A)(a) substituted).

c. The resolution professional may use a challenge mechanism to allow resolution applicants to improve their resolution plans (Regulation 39(1A)(b) substituted).

d. The COC shall not consider the resolution plans

- received beyond the time specified by it under Regulation 36B, or
- received from someone outside the final prospective applicants' list, or
- is not in accordance with Section30(2) and Regulation 39(1).

VI. The IBBI has also notified the IBBI (Liquidation Process) (Second Amendment) Regulations, 2021. Key highlights of the amendment are:

a. The scope of advice the stakeholders consultation committee (SCC) elaborated:

- SCC to advise the liquidator on (a) appointment of professionals and their remuneration, (b) sale under regulation 32, including manner of sale, pre-bid qualifications, reserve price, earnest money, marketing strategy, etc.
- Liquidator shall place before the SCC's first meeting, his decisions made prior to the SCC's constitution. (Regulation 31A(1) substituted).

b. **Nomination to the SCC:** If any class of stakeholders does not nominate its representative to the SCC, such representative to be selected by a majority vote of present and voting stakeholders of that class (earlier, the stakeholder in that class with the highest claim would be selected) (Regulation 31A(4) substituted).

c. Reasons for not following SCC's advice to be mentioned in the next progress report (proviso, Regulation 31A(10)).

d. No requirement of non-refundable deposit for participation in an auction. Earnest money deposit amount to not exceed 10% of the reserve price ((Schedule I, paragraph 1(3)).

e. Liquidator to provide reasons to the highest bidder, if the liquidator rejects his bid. Reasons to be also mentioned in the next progress report (Schedule I, paragraph 1(11A)).

f. In the definition of 'liquidation cost', '*the amount repayable to contributories under sub-regulation (3) of regulation 2A*', replaced by '*the amount repayable under sub-regulation (3) of regulation 2A*' (Regulation 2(1)(ea)(vii)).

g. To improve visibility for the liquidation assets, the IBBI has made an electronic platform for hosting pubic notices of auctions of liquidation assets of ongoing liquidations (IBBI Press Release).

VII. No post-moratorium spike in new insolvency cases in Q1 this fiscal

Contrary to expectations, new bankruptcy cases have come down to the slowest pace in the first quarter of the fiscal due to delays in admission, falling recovery rates and preference among banks for one-time settlements. Quarterly data released by the Insolvency and Bankruptcy Board of India (IBBI) show that only 126 cases were admitted in the first quarter. Total cases increased to 4,541 in June from 4,415 in March 2021.