JANUARY 2020

SUPREME COURT

January 22, 2020

Maharasthra Seamless Limited v. Padmanabhan Venkatesh & Ors., Civil Appeal No. 4242 of 2019

In the instant case the present appeal was filed against the order of NCLAT where it had ordered that the sum mentioned in the approved resolution plan should match the revised liquidation value. In this appeal, resolution applicant also applied for withdrawal of the resolution plan and sought refund of the sum deposited in terms of the resolution plan along with interest.

Two issued were addressed by the SC in this appeal. Firstly, whether the scheme of the Code contemplates that the sum forming part of the resolution plan should match the liquidation value or not. In this regard the SC held that S. 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the AA has to be satisfied that the requirement of subsection (2) of S. 30 of the Code has been complied with. It was of the opinion that these requirements were complied with by the resolution applicant. The SC cited its own judgement in *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta*, (2019 SCC OnLine SC 1478), to hold that the judicial interference in commercial decisions of the CoC is limited and hence the appellate authority should not have interfered with the order AA in directing the successful resolution applicant to enhance their fund inflow upfront.

Hence there was no requirement of matching sum mentioned in resolution plan with the liquidation value. Secondly, whether resolution applicant can withdraw his plan under S. 12-A at this stage. On this issue the SC held that the exit route prescribed under S. 12-A cannot be availed by the resolution applicant. The procedure envisaged in the said provision only applies to applicants invoking Ss. 7, 9 and 10 of the Code.

NCLAT

January 03, 2020

Ved Contracts Pvt. Ltd. v. Pan Realtors Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 908 of 2019

In this case an appeal was filed by the OC against the order passed by the AA (NCLT, New Delhi), whereby the petition filed under S. 9 was rejected on the ground of the 'preexistence of dispute'. The NCLAT relied on the case of *Mobilox Innovation Private Limited v. Kirusa Software Private Limited*, (Civil Appeal No. 9405 of 2017) where the SC had laid down the test for determination of the 'pre-existence of dispute' for admitting and rejecting the petition under Ss. 8 & 9 of the Code, and applying the test of "existence of a dispute", without going into the merit of the dispute.

On perusal of the facts the AT held that it was apparent that the CD had raised a plausible contention to require further investigation, which was not a patently, feeble, legal arguments or an assertion of facts, unsupported by evidence. The OC had not filed any documents to show that the final bill was submitted regarding the alleged contract and the outstanding amount was also acknowledged by the CD. In fact, the email/communication submitted by the CD also showed that there was a pre-existing dispute, before issuance of the demand notice and therefore, the it rejected the application and denied appeal.

January 06, 2020

Simran Kaur v. Haiko Logistic India Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 1520 of 2019

An appeal was filed against the order passed by the NCLT, Chandigarh which admitted an application filed under S. 9 of the IBC. The appellant contended that there was a 'preexisting dispute' on the ground that there was short supply of the goods. The appellant argued that since it is a logistics company delay in supply or loss of material amounts to existence of dispute. However, the NCLAT held that there was no dispute with respect to quality of goods supplied or services and therefore no dispute existed. It was also held that if there is a delay in supply or loss of goods, a person may avail appropriate remedy from the appropriate Court of law but it cannot be a ground for the rejection of an application under S. 9 of the Code.

January 17, 2020

Mr. M. Ravindranath Reddy v. Mr. G. Kishan & Ors., Company Appeal (AT) (Insolvency) No. 331 of 2019

The instant appeal was against the order of NCLT, Hyderabad whereby it admitted the application u/S. 9 against the M/s. Walnut Packaging Private Limited ('CD'). In this case the respondent leased one industrial premise to CD on assurance of timely payment of the rental amount however the latter failed to pay the dues on time.

Accordingly, the respondent served a demand notice which was disputed by the CD. Further, the application u/S. 9 against the CD was accepted by NCLT Hyderabad. The aforesaid admission was challenged in the instant appeal on the ground that the lease amount did not fall within the definition of 'operational debt' under the IBC. Therefore, the primary question before the NCLAT in the present appeal was that whether a landlord by proving lease, will be treated as providing services to the CD, and hence an operational creditor within the meaning of S. 5 (20) r.w. S. 5 (21) of the IBC. The AT stated that for a debt to be an operational debt three conditions should be satisfied. Firstly, the amount of debt should fall within the definitions of a "claim", secondly, such a claim should fall within the definition of "debt", thirdly, such a debt should fall within the scope of "operational debt." In this case, the amount claimed did not fall in any of the above categories.

While allowing the appeal the NCLAT held that the lease of immovable property cannot be considered as supply of goods or rendering any services thus cannot fall within the definition of 'operational debt'. It was of the opinion that: "*In case of lease of immovable property, Default can be determined, on the basis of evidence. While exercising summary jurisdiction, the Adjudicating Authority exercising its power under Insolvency and Bankruptcy Code 2016, cannot give finding regarding default in payment of lease rent, because it requires further investigation.*"

January 21, 2020

Punjab National Bank v. Mr. Kiran Shah Liquidator of ORG Informatics Limited., Company Appeal (AT) (Insolvency) No. 102 of 2020

In the instant case, with the concurrence of the CoC, the RP filed an application for liquidation of CD under Ss. 33 & 34 of IBC before the NCLT. The application was accepted and the RP was asked to continue as the liquidator. Later the instant appeal was filed by appellant against the acceptance of the aforesaid application, being aggrieved by the appointment of liquidator.

However, the NCLAT declined to interfere with the aforementioned order and held that after the liquidation the 'CoC' has no role to play and they are simply claimants whose matters are to be decided by the liquidator. Further the CoC cannot move an application for removal of liquidator after the order of liquidation in the absence of any provisions of law.

January 22, 2020

Navin Raheja v Shilpa Jain & Ors., Company Appeal (AT) (Insolvency) No. 864 of 2019

In this case one of the issue raised for the consideration before the AT was whether the CD can be held to have committed a default, if the apartment/ flat/ premises is otherwise ready but offer of possession was delayed due to the reasons beyond the control of CD such as absence of clearance by the competent authorities/ government(s) etc. It was held that based on the contractual terms, delay in grant of completion/occupation certificate by the government is considered to be 'force majeure' and, therefore, CD is not held to have committed a default to trigger the provisions of the IBC.

January 22, 2020

M/s Ugro Capital Limited v. M/s Bangalore Dehydration and Drying Equipment Co. Pvt. Ltd. (BDDE), Company Appeal (AT) (Insolvency) No. 984 of 2019

The factual matrix of this case was that the appellant had filed an application u/S. 7 of the Code in furtherance of the judgment and decree dated 22.05.2015 and 06.08.2015 respectively, passed by the Hon'ble HC of Delhi. The CD contended that the judgment and decree are not final and the review application is pending before the Hon'ble HC of Delhi without placing any document on record to prove the same. Based on the statement made in reply by the CD the AA presumed pendency of the review application. However, the NCLAT held that the finding of the AA was incorrect because the burden of proof to show that the review application is pending was on the CD. Furthermore, the AT held that, "*creditor means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder*" and therefore if a petition is filed for the realization of a decretal amount, it cannot be dismissed on the ground that applicant should have taken steps for filing execution case in a Civil Court

NCLT

January 04, 2020

Utsav Securities Pvt. Ltd. v. Timeline Buildcon Pvt. Ltd., C.P. No. IB1559(PB)/2019

In the instant case the issue was whether the claim of the petitioner falls under the category of 'financial debt' and the same was disbursed against time value of money. The petitioner was a registered NBFC which advanced certain sum of money as loan to the respondent.

However, the petitioner failed to place on record the agreement reflecting the amount alleged as loan which carried interest on the same, in absence of which it was categorized as a friendly loan by the tribunal.

Reliance was placed by the tribunal on the Black's Law dictionary according to which the 'time value' is defined as: "*the price associated with the length of time that an investor must wait until an investment matures or the related income is earned.*" It observed that the substantive ingredients for 'financial debt' is the disbursal of debt against the consideration for the 'time value of money'. But in this case the business advancement was made without any element of interest. Hence, the petition was dismissed.

January 15, 2020

Oriental Bank of Commerce v. M/s Sikka Papers Ltd. & Ors , (IB)-939(PB)-2018

An application was filed by the RP seeking directions against the ex-director to provide requisite information, documents, and their assistance to the RP, so as to enable him to discharge his duties and obligations smoothly in accordance with the directions of the CoC.

The respondent had been attending all the proceedings of the CoC but did not provide the property documents and the other necessary financial documents. Owing to the absence of these necessary documents, the RP could not prepare the valuation report, which affected the working of the CoC.

In this context the NCLT observed that the respondent is bound to produce all the necessary documents to the RP because the directors are bound to keep the documents of the company in their custody. The NCLT also observed that the assistance of the police station falling within the limits of the CD can be taken to extract all the necessary records of the CD.

January 15, 2020

IDBI Bank Ltd v. Reliance Naval and Engineering Ltd., IB418/NCLT/AHM/2018

The application was filed by the FC for initiation of CIRP against the CD, owing default in payment. Due to economic stress and downfall the CD was taken over by RADA Group. Post takeover, the CD had prepared a refinancing package which was approved by the FC. However due to delay, the refinance package was not accounted resulting in delay in the CDR exit. In addition, the sanction of the refinance package by the other lenders was also delayed. The implementation of the said package became more challenging with the implementation of the RBI guidelines "framework for resolution of stressed assets" wherein 100 % approval of all the lenders was required. This resulted in the accounts being classified as NPA. Subsequently, an OTS proposal was submitted by the CD which was again not accepted by the lenders. The NCLT held that there was an existence of default on face of records and thus admitted the application for CIRP irrespective of the RBI guidelines.

January 16, 2020

Mr. Venkatesan Sankaranarayan v. Kridhan Infrastructure Pvt. Limited., IB197/(PB)/2017

In this case an application was filed by the RP under S. 60 (5) r/w S. 33 of the Code. According to the facts of the case CIRP was initiated against the CD u/S. 7 of the Code and subsequently a RA was duly selected. However, the RA repeatedly failed to honour the commitments under the plan and there was delay in the infusion of equity, upfront payment, taking control of the CD. This subsequently threatened the going concern status of the CD. The performance guarantee of the resolution applicant amounted to Rs. 5 crores. The NCLT observed that the performance guarantee would be forfeited as the resolution applicant failed to implement the resolution plan. Finally, an order for liquidation was passed by the AA.

January 17, 2020

Arenja Enterprise v. Edward Keventer Private Limited, IB/775/ND/2019

The FC had filed an application u/S. 7 of the Code against the CD. Prior to initiating the CIRP, some dispute arose between the parties resulting in a civil suit which was amicably settled by them. As per the settlement the CD had agreed to develop a group housing complex project on a plot of land out which the applicant was entitled to a proportionate build-up area. The FC raised the claim that the CD defaulted as it failed to give possession of the admitted share to the FC. The

main issue was whether the claim made by the petitioner was a 'financial debt' as the CD had not raised any money from the FC in terms of the explanation to S. 5 (8) (f) of the Code. The AA observed that since 'financial debt' means non-payment of money, the decree passed in the civil suit was not for "payment of money". In addition, the bench cannot assume the jurisdiction of the executing Court to direct the CD to deliver the possession of the build-up area to the FC and the other associates. Thus, the AA dismissed the application, relegating the parties to the Civil Court for seeking appropriate legal remedies.

January 20, 2020

Sagaya Annal Associates v. Store N Move Private Limited, CP/1269/IB/2019

In this case an application was filed u/S. 9 of the Code by an OC against the CD for failure to repay its dues. The CD contended that there was a 'pre-existing dispute' between the OC and that there was no proper authority in filing the petition as the managing partner of the OC was a stakeholder of the CD. The NCLT held that since the managing partner of the OC had previously filed a petition (in the year 2016) against the CD on the ground of oppression and mismanagement which was still pending before the same bench, the NCLT acknowledged the 'pre-existence' of dispute. It was observed that the petition filed by the managing partner against the CD in his personal capacity and others also dealing with the transaction would show that there exists a dispute between the parties. It also stated that the OC was not protected under S. 188 (1) of the Companies Act, 2013 because no resolution was passed by the BoD consenting to related party transaction. Hence, the application was dismissed.

January 21, 2020

IL & FS Financial Services Ltd v. KVK Energy and Infrastructure Pvt. Ltd., CP(IB)-430/7/HDB/2019

The petitioner/FC filed an application u/S. 7 of the Code against the CD for default in the repayment of loan along with interest. To this the respondent raised two counters; Firstly, that the petitioner did not place the default recorded with the information utility as required under the Code; Secondly that the FC did not disburse the entire loan amount and if the balance loan amount is disbursed and adjusted against the amount due to be repaid there will be no amount due and liable to be paid by the CD to the FC. The NCLT referred to the case of *Allahabad Bank v. Vardhman Chemtech Limited*, (CP(IB) No.02/Chd/CHD/2018) and held that failure to record default with the IU does not make an application non-maintainable. With respect to the second

issue the tribunal observed that the contention of the CD was not maintainable because the loan agreement empowered the FC to recall the whole or part of the loan along with interest in case of failure to pay any of the instalments. Thus, the FC is under no obligation to make disbursal of the remaining loan amount and adjust the same against instalments due. In addition to the minimum default requirement of Rs. 1 lakh was satisfied. Hence the tribunal admitted the application.

January 22, 2020

M/s. Suresh Chand & Sons LLP v. M/S. Bright Buildtech Private Limited, IB – 1493 (ND) 2019

In the instant case an application was filed u/S. 9 of the Code. It was averred that the CD had failed to pay its brokerage dues on several occasions. On that note, the first issue that was whether the said application was within limitation u/Art. 137 of the Limitation Act and whether the implied acknowledgement constitutes an acknowledgement within S. 18 of the Limitation Act. In the present case, even though invoices were raised on 03.06.2016, the present application was filed on 07.06.2019 and in view of Art. 137, the right to apply accrues. The OC's claim that debt had been acknowledged by the CD through e-mail on 19.04.2018 was accepted by the bench and therefore, the present application was held to be not barred by limitation. Another issue before the bench was whether brokerage services came under 'operational debt' u/S. 5 (21) of the Code. In the present case, the bills raised by the OC were in respect of the services provided to the CD. Hence, brokerage services would fall within the definition of 'operational debt' under the Code.