HIGH COURT

June 23, 2020

Pankaj Agarwal v. Union of India, WP (C) 3685/2020 & CM APPLs. 13194/2020, 13195/2020, 13196/2020 (Delhi High Court).

The NCLT in an earlier order had ordered initiation of CIRP u/S. 9 of the IBC against the petitioner's company. The petitioner contended that his company was an MSME and would go out of business if CIRP continued against the petitioner. More importantly, the petitioner produced an extract of the NCLT order that proved that the NCLT had ignored the notification increasing the threshold of default from Rs. 1 lakh to Rs. 1 crore for the initiation of CIRP. The amount defaulted, in this case, was Rs. 10 lakhs. The Delhi HC stated that the NCLT order would be stayed provided, the petitioner deposited Rs. 10 lakhs to the Registrar of the Court.

NCLAT

June 2, 2020

Corporation Bank v. Uluberia Metaliks Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 461 of 2020.

The application of the appellant (FC) for CIRP u/S. 7 of the Code was rejected by the AA for being time-barred under the Limitation Act (account became NPA on 14.08.2012 and the application was filed on 20.12.2018). The appellant preferred this instant appeal against the rejection before NCLAT.

The appellant relied on the judgment of *Mr. Basab Biraja Paul* v. *Edelweiss Asset Reconstruction Company Limited* [Company Appeal (AT) (Insolvency) No. 772 of 2019] where it was held that the claim of the Bank is not time-barred as it had a mortgage in its favor which extends the limitation to 12 years. The matter is currently pending before the SC. The appellant further contended that as the question of whether the execution of mortgage will help in extending the period of limitation on the basis of mortgage is *sub judice*, their appeal has value and should be allowed.

The NCLAT examined the order passed by the AA where reliance was put on *B.K. Educational Services Private Limited* v. *Parag Gupta* [2018 SCC OnLine SC 1921], where it was held that Article 137 of the Limitation Act is applicable to S. 7 of the Code and it is not the intention of the Code to provide a new lease of life to the debts which are already time-barred by the Limitation Act. Further, it was clarified that provisions relating to mortgages on which the applicant laid reliance

would only apply to suits and not applications for CIRP like the present one. NCLAT rejected the appeal of the FC accordingly.

June 3, 2020

Bank of India v. Ms. Nithin Nutritions Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 497-501 of 2020.

The FC filed applications u/S. 22 of the Code before the AA after B. Naga Bhushan replaced the IRP in the third meeting of the CoC. It was contended that though the CoC had every right to change the RP, the AA rejected all the applications wrongly. The AA held that as the CoC introduced no resolution for replacing the IRP in the first meeting and no reason was provided for the same, now the CoC cannot replace the IRP whenever it wishes.

Before NCLAT, the appellant relied on two judgments, *Punjab National Bank* v. *Mr. Kiran Shah* [Company Appeal (AT) (Ins) 749 of 2019] and *Axis Bank Ltd.* v. *Sixth Dimension Project Solution Ltd.* [Company Appeal (AT) (Ins) No.356 of 2019], where it was held that as per the Code, it is not necessary for the CoC to provide reasons to replace the IRP. NCLAT further held that a reading of S. 22(1) and (2) and S. 27 would further indicate that CoC was not entitled to give a reason. NCLAT further held the AA's assumption that "once the CoC does not replace the IR in the first meeting, then it cannot do so subsequently" as faulty.

NCLAT further considered S. 16(5) of the Code and Reg. 17(3) of the IBBI Regs. 2016 and held that IRP could be changed in the subsequent meetings also if not in the first one without giving any reason. NCLAT did not issue any notice on the appeals to the respondent as no personal allegations were labeled against the IRP.

June 15, 2020

S. Rajendran, RP of PRC International Hotels Private Limited v. S. Mukanchand Bothra, Company Appeal (AT) (Insolvency) No. 844 of 2019.

In the instant case, the father of the appellants filed a claim to the tune of Rs. 15 Crores as the FC before the RP. During the pendency of the trial, the FC expires, and the name of the appellants was substituted in place of the FC as legal heirs. The appellants contended that the RP, on being asked about receiving the money, demanded a copy of the will, probate order, succession certificate, etc., even after the resolution plan was approved. The appellant further questioned the order of the new bench of NCLT as review or modification is not available under IBC. The RP pleaded that the appellants were claiming money without any proof and that they refused

publication of notice in a newspaper having all India circulation. NCLAT observed that the RP consented to the substitution of legal heirs of the FC. It was noted that it is baseless to demand a succession certificate at a stage when the resolution plan is final. Further, it was seen that the appellants did not comply with the earlier order of the AA; hence the new order cannot be treated as a modification of the earlier order. The order for publication of notice in the newspaper is without any justification because legal heirs of late FC was already on record. Since the approved resolution plan is binding on all the stakeholders, the RP has no right to again raise the issue of succession from the appellants at the time of distribution of amount.

June 24, 2020

Mr. Sandip Patel v. Central Bank of India, Company Appeal (AT) (Insolvency) No. 730 of 2019.

In the instant case, the appellant filed CP u/S. 7 of IBC before the AA in the year 2017. Subsequently, the 1st respondent filed an application against the same CD and CIRP was initiated. The CoC, with the sole creditor being the respondent, in their meeting, decided to withdraw the CP filed against CD. The minutes record that the IRP informed that only one claim from respondent 1 as FC was received till the last date of submission of claims. Some claims were received after the last date of submission and they were still under verification. Hence the meeting could have been adjourned. After the moratorium was applied, respondent 1 took advantage of the only asset to itself, and then withdrew the proceeding. The appellant sought for the restoration of the CP filed by respondent 1 as the CP filed by the appellant against the CD would be of no help. After perusing the facts of the case, NCLAT set aside the AA order and held that the decision of the CoC to withdraw the application is arbitrary and against the conscience of legal jurisprudence. The petition was directed to be restored.

June 24, 2020

Smt. Anamika Singh v. Shinhan Bank, Company Appeal (AT) (Insolvency) No. 912-913 of 2019.

In the instant case, the appellants advanced short-term loans to the CD at different interest rates and the CD failed to pay them back in the said time. The OC initiated CIRP against the CD, and subsequently, respondent 3 was appointed the RP. Following this, the RP asked creditors of the CD to submit their claims and the appellants also filed their claims before the RP. The AA in the said matter held that S. 73(2) of the CA, 2013 would not apply. It also went on to declare the appellants as unsecured creditors and held the transaction as "Extortionate Credit Transaction"

u/S. 50 of the IBC since the rate of interest charged was exorbitant on an application by the FC (respondent 1). The transactions of the appellants were held to be not legal in the eyes of the law as they were exorbitant and hence, illegal. The question before the AT was whether the loans advanced by the appellants were legal in the eye of law and whether they can be treated as unsecured creditors. The appellants contended that an application for the avoidance of transaction must be made by the RP or the liquidator and not the FC as per S. 60(5). The AT, however, upheld the application of FC and passed the order in exercise of jurisdiction as enshrined u/S. 60(5) of the IBC. It held that the AA u/S. 60(5) has jurisdiction to entertain or dispose of any application or proceeding by or against the CD or Corporate person.

June 25, 2020

Mr. Abhijit Guhathakurta Monitoring Agency of the Corporate Debtor v. Royale Partners Investment Fund Ltd., Company Appeal (AT) (Insolvency) No. 287 of 2020.

In the instant case, the NCLT had reserved orders on 30.01.2020 in MA No. 249/2020 in CP (IB) No. 1832/MB/2017. Another application was filed by the resolution applicant (appellant in company appeal) before a re-constituted bench. The coordinate bench of the tribunal stayed all the orders to be passed in the case. It had the option of directing the office of registry of the bench to place the application before the president of NCLT, Delhi for obtaining necessary orders. Such a proper recourse was not resorted to. NCLAT held that it is not out of place for the tribunal to make a pertinent mention that 'probity,' 'judicial decorum,' 'propriety' and 'comity of judicial discipline' require that a coordinate bench cannot stay an order which was reserved by another coordinate bench of the same tribunal. The newly re-constituted NCLT bench cannot sit in judgement as an appellate authority in respect of a subject matter, in which the erstwhile bench reserved an order. In short, the passing an order of stay of all proceedings until the next date of hearing by the newly re-constituted Bench, is *per se* an illegal, nullity and *non-est* one, in the eye of law.

June 26, 2020

M/s. Kotak Resources v. Dharmendra Dhelaria & Ors., Company Appeal (AT) (Insolvency) No. 569 of 2020.

The issue raised in this appeal is by the FC regarding the CIRP cost, the liability of which has been laid upon the CoC. The appellant challenged the jurisdiction of the AA to make all the members of CoC equally liable for CIRP costs on the ground that the CIRP was not only for their benefit. The order directing the CoC to reimburse came after the RP initiated proceedings u/S. 60 of the

Code against the CoC. The CoC approved the appointment of the IRP as the RP, and another FC was included in the CoC upon its constitution by the RP with its consent. Later, in a meeting, the CoC approved the resolution costs; hence it was held to be fallacious to contend that the AA lacked jurisdiction to provide for the resolution costs. Since the AT rejected the admitted application, CIRP cost will be borne by the members of CoC equally.

NCLT

June 2, 2020

G Trans Logistics (India) Pvt. Ltd. v. Emtex Engineering Pvt. Ltd., (IB) 1093 (ND) – 2018.

The instant case arose out of the OC filing an application to initiate CIRP u/S.9 of IBC as against the CD, on account of defaulting payment against invoices raised by the OC. A demand notice was issued by the OC against the CD upon which the CD failed to bring to the notice of the OC the existence of a dispute. The CD contended that the OC had never signed the Letter of Intent. Therefore, only an oral agreement was constituted. The OC countered by applying the rule of implied consent through action u/S. 9 of the Indian Contract Act. The AA adjudged that the CD failed to fulfil the obligations under Ss. 8 and 9 of the Code, therefore, the OC can invoke the provisions under S. 9 of the Code. The AA admitted the application and appointed an IRP.

June 4, 2020

Tata Capital Financial Services Ltd. v. Baldeo Metals Pvt. Ltd., (IB) 1808 (ND) - 2019.

The FC filed a petition u/S. 7 of the IBC to start CIRP against the CD on the grounds of its inability to liquidate its financial debts. The CD had executed a Channel Financing Agreement with the FC and the FC had made disbursements to a distributor and not the CD at his request. The FC submitted that they made timely disbursements and the CD defaulted and subsequently, a recovery letter and a loan recall notice were served to the CD. The CD had contended that the FC was obligated to make drawdown request prior to the disbursements, and they should be made directly to them. The FC also submitted that the AA is not required to determine the actual amount of claim as previously held by NCLAT. The AA observed that owing to the Channel Finance Agreement between the parties, the CD agreed to pay the amount to the seller, and their contention regarding direct payment was not liable to be accepted. The AA observed that in view of the facts of the case, the FC had duly sent a legal notice as well as a loan recall notice to the CD, and the contention of the CD was rejected. The AA held that the loan was duly sanctioned and disbursed but the debt was not repaid. Upon such default, the AA admitted the application u/S. 7 of the Code.

June 12, 2020

M/s. Omni Media Communications Pvt. Ltd. v. Jay Polychem India Ltd., CA 95-96-C-V-ND-2019 in (IB) 419 (ND) - 2017.

The two applications were filed u/S. 9 of the IBC by the RP. The AA adjudged the matter jointly as the prayer consisted of penal action in both. The RP had admitted the claims of the FC and the OC and upon request of records from the CD, received none. Further, the RP contended that it received no satisfactory response from the ex-director, the CD or the statutory auditor and claimed against the respondents for defrauding the FC. The respondents questioned the submissions of the RP as they were based on the forensic audit report and claimed complete cooperation with the RP's requests. The AA questioned whether it was competent to take penal action against the ex-director and the statutory auditor. The AA found that the RP, on the basis of a forensic audit report, had submitted that there were financial irregularities and misappropriation of funds of the CD by several respondents. Relying on *Lagadapati Ramesh* v. *Ramanathan Bhuvaneshwari,* [C.A. No. 574 of 2019], the AA held that it is not competent to direct that the investigation be carried out by serious fraud investigation officer. If a *prima facie* case is made out u/S. 213 of the CA, 2013, it can refer the matter to the Central Government. The AA found penal diversion of funds and held that a *prima facie* case for further investigation was made. The AA denied commenting on the merit of the facts and referred the case to the Central Government and disposed of both the CAs.

June 12, 2020

AstraZeneca Pharma India Ltd. v. Brosbel Engineering Pvt. Ltd., CP (IB) No. 130/BB/2020.

The instant case arose out of the OC initiating CIRP against the CD u/S. 9 of the IBC read with Rule 6 of IBBI (Application to Adjudicating Authority) Rules, 2016, upon the CD failing to fulfil a delivery of goods under a purchase order after taking an advance payment from the CD. The OC then approached the AA to recover the amount of payment from the CD. However, the AA pointed out that under the terms of the purchase order, in case of any dispute arising out of the concerned purchase order, such dispute should be settled amicably failing which it would be subjected to arbitration by the CEO/MD of AstraZeneca in accordance with the Arbitration Act. Yet, the OC failed to invoke the remedy available for the refund of the payment and chose to approach the AA under the Code to recover the amount. The AA observed that the OC had failed to present any agreement or commitment of the CD to return the advance paid and that, for the delivery of the goods, the Arbitration Act needed to be invoked. The AA held that it is not a recovery forum, and the OC had failed to establish that the CD had become insolvent. The AA

adjudged that the issues of the case cannot be contemplated under the provisions of the Code and held that the CP is not maintainable under the Code.

June 16, 2020

The Jammu & Kashmir Bank Ltd. v. Vinayak Rathi Steels Rolling Mills Pvt. Ltd., (IB) 1295 (ND) - 2019.

The FC had initiated CIRP against the CD u/S. 7 of the IBC on default on the payment of the loan. The CD had accepted the default on the payment of debt and further submitted that he had mortgaged several immoveable properties whose sale would effectively recover the loan amount. However, the FC contended that it was unable to sell the mortgaged property at the valued price and recover the loan. The CD contended *mala fide* intention on the part of the FC and their failure to disclose the realization of rent from one of the properties. Further, the CD contended that the FC could liquidate the debt through the sale of the same, and thus, there was no default.

The question before the AA was whether the possession of any immoveable property amounts to the realisation of debt. The AA observed that the Code brings in 'determination of default'. Relying on the case of *Innovative Industries Ltd.* v. *ICICI Bank* [2018 (1) SC 407], the AA observed that if the default of payment by the CD was established which is due and payable, the application was complete and no disciplinary proceedings were pending against the proposed RP.

Therefore, the CD's averments in the written submission stating that the FC had taken possession of the property whose sale would recover the debt is not liable to be accepted. The AA found all the conditions u/S. 7 of the Code to be fulfilled and admitted the application.

June 25, 2020

Totem Media Solutions Pvt. Ltd. v. V2 Retail Ltd., C.P. No. (IB) 2618/ND/2019.

The OC initiated CIRP against the CD u/S. 9 of the IBC upon non-payment of purchase orders. A demand notice was sent by the OC on 29.07.2019. However, CD replied to the demand notice dated 16.08.2019, stating the rates of the invoices to be excessive and informed the OC to fix a nominal rate via WhatsApp and email. The CD had annexed WhatsApp texts with a third company to compare the purchase prices to deem the OC's invoices to be excessive. The OC denied the relation of the WhatsApp texts to the invoices.

However, the AA deemed the WhatsApp communication irrelevant as the parties to the communication were the CD and a third party and not the CD and the OC. Further, the AA observed that the CD had wrongly stated the date of receiving the demand notice to be 10.08.2019

while there was evidence to prove the delivery on 29.07.2019. The AA held that the reply of the demand notice, as payment or notice, was not sent within 10 days as prescribed u/S. 8 of the Code. Therefore, it found the application complete u/S. 9(5)(i) of the Code and admitted the application, therefore, appointing an IRP.