HIGH COURT

May 1, 2020

Electrosteel Steels Limited v. The State of Jharkhand and Ors., WP (T) No. 6324-6327 of 2019 (Jharkhand High Court).

In this case, a garnishee order of the Deputy Commissioner of Tax, Bokaro, was challenged by the petitioner company. SBI had filed for CIRP u/S. 7 of the Code before the NCLT, Kolkata, and an IRP was appointed as well. The RP filed a resolution plan, and it was approved by the CoC, the NCLT, and the NCLAT. The counsel for Electrosteels contended that the Tax Department fell under the term OC of the Code and that the resolution plan was binding on the Tax Department according to S. 31 of the IBC. The Attorney General (AG) for the State of Jharkhand on the other hand, argued that the company had been collecting VAT from its customers and this had not been in the State Exchequer, thereby constituting misappropriation. Further, the AG contended that the NCLT had made public the resolution proceedings only in Kolkata since it was published in a Kolkata newspaper. This made it impossible for the Tax Department to take part in the resolution proceedings as they were unaware that the CIRP had been initiated. The Jharkhand HC's findings were two-fold. *First*, it held that the amendment to S. 31 of the IBC was prospective in nature and not retrospective; hence, the State was entitled to the dues owed to it irrespective of the initiation of CIRP. *Second*, it found that indirect tax (VAT) did not fall within the definition of operational debt u/S. 5(21) of the Code. Additionally, since the publication of the resolution proceedings were restricted to Kolkata, S. 13(1)(b) of the Code read with Reg. 6 had been violated. The Court thus disposed the WP and ruled in favour of the Commercial Taxes Department.

NCLAT

May 22, 2020

Indian Oil Corporation Ltd. v. Mr. Ashish Arjun Kumar Rathi, Company Appeal (AT) (Insolvency) No. 1116 of 2019.

In the present case, the OC had a contract with SBQ Steel limited, which was breached by the CD. Based on that, the OC claimed damage and compensation worth Rs. 2.35 crores and interest worth Rs. 2.90 crores. Both the claims were rejected by the liquidator, as there was no agreement regarding the same between them, without assigning detailed reasons.

The OC claimed before NCLAT u/S. 40 of the Code that the liquidator was bound to provide them with detailed reasons for rejecting their claims. The CD submitted that the amount towards

compensation for investment is subject to an ongoing arbitration proceeding, and with respect to the claim towards the interest of Rs. 2.90 crores, no such contractual agreement was there between the parties. Hence, the liquidator rightly rejected the claims. Further, in a meeting with the appellant, the RP informed about the reason for such rejection.

The NCLAT held that keeping in mind S. 40(1) of the Code, not assigning reason to a claim of rejection, is not a prudent course of action and is not tenable in the eye of law. The liquidator is an authority, and his decisions are open to challenge u/S. 42 of the Code. Further, the claims of the appellant were held as actionable. The NCLAT allowed the appeal and directed the AA to pass fresh orders based on merits.

May 22, 2020

Union of India v. Oriental Bank of Commerce, Company Appeal (AT) (Insolvency) No. 1417 of 2020.

The AA, in the order in the matter of *Oriental Bank of Commerce* v. *M/s Sikka Papers Ltd.* [(IB) No. 939 (PB)/2018], directed that the Ministry of Corporate Affairs (MCA) should be impleaded in every suit related to the IBC and CP for the proper appreciation of matters and directed all NCLT benches to do the needful.

The MCA challenged the order based on the ground that the said direction of making MCA party to every IBC and Company matter was a rule in the guise of an order and was certainly beyond the power of NCLT, as rulemaking is the domain of the executive. Hence, the order is not tenable in the eye of law. The respondent contended that the order was passed by virtue of an application that was filed by the RP because of some problem to comply with the provisions of the CA, 2013. Further, they claimed that as they are not a relevant party to the suit, and therefore, the appeal is unsustainable.

The NCLAT stressed on the principles of natural justice. It held that a notice should have been issued to the MCA first to hear their objections or claims regarding this matter. Further, it was stated that though NCLT has *suo moto* power to attach a party to a matter, that has to be decided on a case to case basis. MCA cannot be made a party to every case in such a generalized manner. The order passed by the AA was held to be untenable in law, allowing the appeal.

May 22, 2020

Allahabad Bank v. Poonam Resorts Limited, Company Appeal (AT) (Insolvency) No. 1303 & 1304 of 2019.

The FC filed a CIRP against the two CDs based on the defaults committed u/S. 7 of the Code. The CDs claimed that the application was fraudulent and was initiated with a malicious intent seeking to drag a solvent corporate through insolvency. They asserted that they are ready to pay the dues, which are legally owed to the FC. The AA appointed an independent auditor and asserted that due diligence was not followed by the FC. The FC preferred the appeal before NCLAT against two orders passed by the AA on the ground that proper dictum of the law was not followed.

The application by the FC was pending before the AA since 18.09.2019. But instead of admitting or rejecting the application, the AA passed the order of audit. NCLAT relied on S. 7(4) of the Code and stated that the existence of default has to be ascertained within 14 days of the application through information utility or the documents provided by the FC, and the entire CIRP process also needs to be wrapped up within a time-bound manner.

It was further held that S. 75 is a penal provision and can only be applied if there is a *prima facie* case of forgery or falsification. The same cannot be used during the admission of CIRP. Further, as the CD accepted debt in their written submission, they cannot argue that the applications u/S. 7 need to pass through scrutiny u/S. 65 of the Code at a pre-admission stage. The order of NCLT was set aside, and the appeal was allowed.

May 22, 2020

Gradient Nirman Private Limited and Anr. v. IFCI Ltd. and Ors., Company Appeal (AT) (Insolvency) No. 1491 of 2019.

The CD had sanctioned a part of the loan amount of Rs. 60 crores to develop some projects in the IT Sector. The rest of the loan was not transferred as the CD defaulted in the first loan instalment. Further, they failed to complete the project. The Enforcement Directorate (ED) attached their property, and Telangana State Industrial Infrastructure Corporation (TSIIC) cancelled their rent allotment. CIRP u/S. 7 of the Code was initiated.

The Counsel for the appellant (CD) argued that the CIRP process is barred by limitation as the default date was 15.10.2013. Further, there was no formal acknowledgment of debt to take benefit of S. 18 of the Limitation Act. The OTS, which was offered, was in 2018, was also well past the limitation period of 3 years. It was contended by the FC that it was entitled to the exclusion of

time period u/S. 14 of the Limitation Act as it had taken steps to initiate proceedings before DRT on 14.11.2014 and later under the SARFAESI Act, 2002.

The question of law for consideration was whether the CIRP application is barred by limitation. NCLAT observed that as proceedings under SARFAESI and S. 7 of the IBC are different (the latter not being a recovery suit), benefit u/S. 14(2) of the Limitation Act cannot be granted unless it is shown that the application u/S. 7 of the Code was prosecuting with due diligence in a court of first instance or of appeal or revision which has no jurisdiction. The dictum of *Sampuran Singh* v. *Niranjan Kaur* [(1999) 2 SCC 679] was followed as a suit for recovery under SARFAESI even without limitation, cannot affect proceedings u/S. 7 of the IBC (winding-up proceedings). Hence, the contention of the appellant for extending the limitation was rejected. NCLAT allowed the appeal.

May 22, 2020

State Bank of India v. M/s. Metenere Ltd., Company Appeal (AT) (Insolvency) No. 76 of 2020.

The FC initiated CIRP u/S. 7 of the Code against the CD and appointed an RP; however, the CD was of the view that the RP was likely to act unfairly considering his association with the FC. Subsequently, the FC filed an appeal against the NCLT order that directed the substitution of the name of the RP to act as an IRP. The appellant submits that the Code and the regs. do not disqualify an ex-employee of an FC from being appointed as an IRP. It was further contended that he is not required to be an independent umpire, instead only facilitate the CIRP process. The appellant claims that the IRP has no role in the decision-making committee of the Bank. The respondents submit that the IRP appointed is an 'interested person' being an ex-employee of the FC, thus rendered ineligible under the Code. The RP, being a pensioner under Service Rules, is a qualified Insolvency Professional under Reg. 3(1) of IBBI Regs., 2016. Further, it was contended that the argument that he comes under the ambit of "interested person" drawing salary within the Income Tax Act defies logic. The RP's four-decade-long association with the Bank instilled fear of bias in the mind of the CD. NCLAT held that the Bank restricted its choice of IRP and that the perception of bias rests upon the respondent. Hence, NCLAT upheld the decision of the AA to substitute the IRP for a fair CIRP.

May 29, 2020

Shabad Khan v. M/s. Nisus Finance and Investment Manager & Ors., Company Appeal (AT) (Insolvency) No. 82 of 2020.

In a Debenture Trust Deed, the issuer company defaulted in the payment for NCDs. The company sought more time for payment, and FC marked the copies of the letter to CD and other obligors who issued cheques in favour of the Debenture Trustee. The cheque bounced, and the CD claimed that there was a delay on the part of FC in disbursing funds. It was alleged that the FC failed to infuse funds in the company's project. NCLT upheld the CIRP by rejecting CD's claims, and it noted that although CD admitted to its liability, it did not offer its possession to the FC. It was contended on appeal that the FC could not initiate three CIRPs against the CD for the same and identical claims. On behalf of the FCs, it was contended that the law laid down in *Dr. Vishnu Kumar Agarwal* v. *M/s. Piramal Enterprises Ltd.* [Company Appeal (AT) (Insolvency) No. 346 of 2018] does not apply because the CD is a primary obligor and the issuer company is only an assignee of the CD. It is also submitted that an embargo is not an absolute bar against the initiation of CIRP against two CDs. The Apex Court did not entertain the plea of collusion (u/S. 65 of IBC) and relegated the FC to remedy before the AA. It was held that S. 7 of the Code would come into only when S. 65 is disposed of. In the instant case, respondent 2 initiated CIRP against CD and also the issuer company. As per the dictum in *Vishnu Kumar*'s case, it was held that a CIRP by an FC simultaneously against the principal borrower and corporate guarantors for the same set of claims is impermissible.

NCLT

May 5, 2020

M/S. Alliance Biomedica Pvt. Ltd. v. M/s. Stemcell Transplantation Assisted Reproduction Research Pvt. Ltd., IBA/900/2019.

This was a case filed by the OC u/S. 9 of IBC for the initiation of CIRP against a CD. The OC was engaged in the business of sale, service of top-of-the-line health care equipment available to the hospitals in India, including to the CD. Even after a demand notice was served to the CD, the CD disputed the claims, and the OC had failed to fulfil their obligations towards the installation of the equipment. The AA observed that even though the CD had alleged that the OC has delayed in installing the equipment at the premises of the CD, the CD has not placed on record any documents to show, nor any email exchanges, with an intent only to evade the payments to be made to the OC. Further, when the T&Cs of the purchase order do not explicitly state that the

payments will be made after installation of the equipment, the plea raised by the CD was found to be meritless. Therefore, the said petition was admitted u/S. 9(5) of the IBC.

May 5, 2020

M/s. Ingram Micro India Pvt. Ltd. v. M/s. ASP Computers Pvt. Ltd., IBA/1195/2019.

An application was filed u/S. 9 of IBC by the OC against the CD. The Court held that the preliminary argument raised by the CD that filing of S. 138 of the NI Act by the OC before the Magistrate Court, Bombay, would amount to a pre-existing dispute is no longer *res integra*. The OC had also filed an affidavit mandated u/S. 9(3)(b) of the IBC wherein they had stated that after the issuance of the demand notice, the CD had not issued any notice of dispute nor paid the amount due to the OC. Thus, the AA was perforce to initiate CIRP in relation to the CD in admitting this petition.

May 6, 2020

Andhra Bank v. Leo Meridien Infrastructure Projects and Hotels, IA No. 54/2020 in CP (IB) No. 43/7/HDB/2018.

This was an application filed by the RP of the CD seeking for the removal of a provisional attachment imposed. It was averred that the provisional attachment order (Order) was in violation of the moratorium u/S. 14 of the IBC as the Order is a civil proceeding for the purpose of S. 14, which is covered under the moratorium of CD. The RP contended that the FC acted in violation by encumbering the assets of the CD.

The respondent contended that NCLT had no jurisdiction to set aside any order passed by the ED under the provision of the PMLA, which is an Act intended to punish for contraventions resulting in punishment and confiscation. Further, the learned counsel for ED contended that S. 32A of the IBC is not applicable to the present case since the CoC has not yet approved any RP as on the date of issuing the Order. The AA dismissed the said petition and held S. 32A would not be applicable here as the Order was passed when no CoC was approved.

May 27, 2020

Suraksha Asset Reconstruction Ltd. v. M/s. Noida Medicare Centre Ltd., (IB) 2039 (ND)/2019.

This was an application filed by the FC u/S. 7 of IBC to initiate CIRP against the CD. Subsequent to obtaining credit facilities from Kotak Mahindra Bank (the original lender), the CD failed to keep

its account regular and, thus, committed various defaults in contravention of the express conditions contained in the loan documents. Consequently, the original lender declared the account of the CD as NPA due to continuing defaults. Thereafter, the original lender assigned the debt to FC by way of an assignment agreement. However, despite the said restructuring and repeated requests and demands by the applicant, the CD failed and neglected to repay the amount due. The CD also contended that the FC had played fraud u/S. 60(5) of IBC as after the said restructuring, the FC could not have terminated the said restructuring unilaterally.

However, the AA rejected the CD's arguments and observed that the loan was restructured as per the SARFAESI, and the same was done on the request of the CD, and therefore, the said petition was admitted for CIRP.

May 27, 2020

Burda Druck India Pvt. Ltd. v. Dynamic Textbooks Printers Pvt. Ltd., (IB) 2223 (ND)/ 2019.

In the instant case, the OC filed an application to start CIRP u/S. 9 of the IBC against the CD due to no-payment of dues. The main contention was whether the application was time-barred under the Limitation Act. The AA, invoking Ss. 8 and 9 of the Code, held that since the CD failed to reply to the demand notice u/S. 8(2), he cannot respond to it subsequent to the OC filing an application. This was in furtherance to the CD admitting that they had not replied to the demand notice as required u/S. 8. The CD had contended that the application was time-barred since the last payment was made in 2015. However, the OC presented a transaction from the CD on 18.01.2017, which was within 3 years of the date of issuance of invoice u/S. 137 of the Limitation Act from which a fresh period of limitation is computed. Therefore, the AA held that u/S. 19 of the Limitation Act, the application was not time-barred. The AA adjudged that since the application was complete and there existed unpaid operational debt and the CD failed to give a notice of dispute u/S. 8, the application should be admitted. Further, the AA appointed an IRP.

May 29, 2020

Navalmar (UK) Ltd. v. Navalmar Shipping (India) Pvt. Ltd., CP (IB) No. 324/BB/2019.

The OC initiated CIRP u/S. 9 of the IBC against the CD who had a committed a default. The CD raised the issue of a pre-existing dispute and fabricated debit notes being annexed by the OC and a false amount being demanded by the OC. The OC contended that the CD admitted outstanding payments and had not considered various debit notes issued by the OC. Moreover, the CD contended that the OC could not proceed under the Code as it was solvent, to which the OC

presented that the CD did not have the required income to clear the operational debt. The AA observed that the CD did not have a valid or *bona fide* pre-existing dispute. The AA rejected the CD's main contention that the OC's claimed amount and their financial records do not match and held that the AA does not have the duty to ascertain the disputed amount but forward proceedings upon the instance of an operational debt existing and its default. Perusing the records, the AA observed that there was no pre-existing dispute between the parties that comes in the way of the proceedings. The AA held that investigation into the fabrication of documents, the conflict between directors, and violation of FEMA Regs. are outside the scope of the summary proceedings and not the responsibility of the AA. The AA observed that CD had admitted to default in its statements and had lost the ability to clear the debts. Therefore, the AA admitted the application.