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I. NCLAT: Decree holder cannot be classified as a financial creditor for the purpose of initiating Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016

The National Company Law Appellate Tribunal, New Delhi (**"NCLAT"**) has in its judgment dated August 14, 2020 (**"Judgment"**) in the matter of ***Sushil Ansal v. Ashok Tripathi and Others [Company Appeal (AT) (Insolvency) No. 452 of 2020],*** held that a decree holder cannot be classified as a financial creditor for the purpose of initiating Corporate Insolvency Resolution Process (**"CIRP"**) under the Insolvency and Bankruptcy Code, 2016 (**"IBC"**).

Facts

Brief facts of the case are that on August 5, 2014, one Mr. Ashok Tripathi (**"Respondent No. 1"**) and Mr. Saurabh Tripathi (**"Respondent No. 2"**) (collectively, **"Respondents"**) had jointly booked a unit bearing No. 0073, admeasuring 3746 sq. ft., with M/s. Ansal Properties and Infrastructure Limited (**"Corporate Debtor"**) in one of their real estate projects namely, Sushant Golf City, in Lucknow, for a total consideration of INR 1,62,43,133/- by paying an amount of INR 8,37,300/- towards booking advance. In a separate transaction, Respondent No. 2 had on July 16, 2014, booked another unit bearing No. B7/GF/01, admeasuring 1229 sq. ft. in the same project, by paying an amount of INR 1,63,994/- as booking advance. A joint "built up agreement/builder buyer agreement" dated September 12, 2014, in respect of the unit bearing No. 0073 and a "Flat Buyer Agreement" dated September 28, 2014 in respect of the unit bearing No. B7/GF/01 was executed between the respective Respondents with the Corporate Debtor. Pursuant to execution of the aforementioned agreements, allotment letters pertaining to the said units were issued by the Corporate Debtor to each of the Respondents.

The Corporate Debtor undertook to complete the construction of the said units and to deliver possession thereof to the said Respondents within 2 years from the date of commencement of construction. Since the project commencement date notified on the website of RERA was September 22, 2015, the Corporate Debtor was required to deliver possession of the unit bearing No. 0073 to both the Respondents by September 22, 2017 and deliver possession of the unit bearing No. B7/GF/01 to the Respondent No. 2 within 36 months from the date of the building plan being sanctioned. However, even after the passing of 5 years of the aforementioned time frame, the Corporate Debtor failed to complete the construction of the said units or refund the amounts paid as booking advance, to the Respondents.

Aggrieved by the above, the Respondents lodged a complaint before the Uttar Pradesh Real Estate Regulatory Authority (**"UP RERA"**) to establish the existence of a financial debt and liability of the Corporate Debtor to the tune of INR 73,35,686.43. Pursuant to this, on November 16, 2017, the UP RERA directed the Corporate Debtor to refund the amount repayable to the Respondents with respect to the unit bearing No. 0073 in 6 instalments within a period of 9 months. Subsequently, on December 13, 2018, the UP RERA further directed the Corporate Debtor to refund the amount paid with respect to the unit bearing No. B7/GF/01 to Respondent No.2 in 10 monthly instalments along with interest. Consequently, a Recovery Certificate dated August 10, 2019 (**"Recovery Certificate"**) was issued by the UP RERA in this regard and forwarded to the concerned authority for effecting the recovery of INR 73,35,686.43 from the Corporate Debtor. However, the Respondents chose to file an application under Section 7 of the IBC for initiation of CIRP before the National Company Law Tribunal, New Delhi (**"NCLT"**) even though they were entitled to seek disbursement of the abovementioned amount of INR 73,35,686.43 from UP RERA upon its recovery.

The NCLT observed that the claim of the allottees had arisen out of the aforementioned orders and Recovery Certificate issued by the UP RERA and termed such claim as an 'adjudicated debt'. It therefore held that the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 (**"Ordinance"**) promulgated on December 28, 2019, which prescribes a minimum threshold limit of not less than 100 allottees or not less than 10% of the total number of allottees under the same real estate project, whichever is less, for initiation of CIRP at the instance of allottees of a real estate project, was not attracted in the present case, as the Respondents went before the NCLT as decree-holders and not as allottees. Thus, the NCLT, vide its impugned order dated March 17, 2020 (**"NCLT Order"**), admitted the application of the Respondents for initiating CIRP. Aggrieved by the said NCLT Order, Mr. Sushil Ansal, a former director and shareholder of the Corporate Debtor (**"Appellant"**), filed the present appeal before the NCLAT.

Issues

(i) Whether this is a fit case for invoking Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 (**"NCLAT Rules"**) to allow the parties to settle the dispute?

(ii) Whether the application filed by the Respondents under Section 7 of the IBC was not maintainable?

Arguments

Contentions raised by the Appellant:

The Appellant *inter alia* contended that the application filed by the Respondents under Section 7 of the IBC was not maintainable as the Respondents did not meet the required criteria of either constituting 100 allottees or 10% of the total allottees as mandated under the Ordinance, and therefore were ineligible to by themselves file an application under Section 7 of the IBC for initiation of CIRP against the Corporate Debtor. The Appellant argued that the Ordinance was promulgated and came into force during the pendency of the applications filed by the Respondents before the NCLT and therefore the NCLT should have insisted upon compliance with the mandate under the Ordinance regarding the threshold limit before proceeding to pass the impugned order. It was further argued that the Ordinance was followed by the passing of the Insolvency and Bankruptcy Code (Amendment) Act, 2020 (**"Amendment Act"**) which incorporated the provisions of the Ordinance, and in effect crystallised the legal position pertaining to eligibility for initiating of CIRP, and therefore the application filed by the Respondents under Section 7 was not maintainable. It was also urged that classification of allottees as Financial Creditors was not permissible and merely because the Respondents had obtained a RERA decree in their favour, it did not alter their status. Therefore, the finding recorded by the NCLT that the allottees who have obtained a decree in their favour would not be hit by the requirement of threshold limit under the Ordinance followed by the Amendment Act was flawed. It was further submitted that the dispute stood settled between the Corporate Debtor and the Respondents in terms of an amicable settlement between the parties pursuant to which they had filed a joint application for withdrawal and termination of CIRP of the Corporate Debtor.

Contentions raised by the Respondents:

The Respondents on the other hand contended that they had settled all their disputes with the Appellant in relation to the unit bearing no. 0073 and they do not have any pending claims against the Corporate Debtor. The Respondents accordingly prayed for invoking Rule 11 of the NCLAT Rules to set aside the order of admission and terminate the CIRP against the Corporate Debtor. It was further submitted that the dispute was settled prior to constitution of a committee of creditors and therefore there was no legal impediment in allowing such settlement and permit withdrawal and termination of CIRP. In so far as the claims of other home buyers/ creditors was concerned, it was submitted that they could pursue their claims independently on their own merits through any remedy as may be available under law. As regards the instant appeal, it was submitted that the Respondents did not wish to contest the issue raised by the Appellant regarding maintainability of the application under Section 7 filed by them and, therefore, agreed and subscribed to the arguments advanced by the Appellant.

Observations of the National Company Law Appellate Tribunal, New Delhi:

The NCLAT observed that a Corporate Debtor was permitted to seek exit from CIRP at the pre-admission stage. It could also seek exit at the post admission stage, but before constitution of the Committee of Creditors. It was manifest that a party to CIRP could approach the adjudicating authority directly for exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016 for withdrawal of the application under Section 7 of the IBC or disposal of such application on the basis of a settlement worked out by the parties. However, exercise of inherent power on the part of adjudicating authority or even by the NCLAT in appeal would depend on consideration of all relevant facts of the case. The adjudicating authority or the appellate tribunal would have to keep in view the interest of various stakeholders and claimants before allowing such withdrawal or settlement. Admittedly, the interim resolution professional had received 283 claims against the Corporate Debtor from allottees of different projects, financial creditors, operational creditors, other creditors and employees. The Settlement Deed executed between the Respondents and the Corporate Debtor did not take into consideration the interest of such other claimants. Therefore, allowing the withdrawal of application under Section 7 of the IBC on the basis of such settlement between the Respondents and the Corporate Debtor was not all-encompassing and detrimental to the interests of the other claimants, including the other allottees, and accordingly would not be in consonance with the object of the IBC and the purpose of invoking of Rule 11 of the NCLAT Rules.

With respect to maintainability of the application under Section 7 of the IBC, the NCLAT observed that the dictum of law was loud and clear. An application for initiating CIRP against the Corporate Debtor by allottees under a real estate project was required to be filed jointly by not less than one hundred of such allottees or not less than 10% of the total number of such allottees under the same real estate project. It is therefore clear that an application at the instance of a single allottee or by a group of allottees falling short of the prescribed threshold limit would not be maintainable.

It was further observed by the NCLAT that, the Respondents' contention of coming within the purview of 'financial creditors' rested on strength of the definition of 'creditor' in terms of the provision under Section 3(10) of the IBC which includes a decree-holder within its fold. The question that arose for consideration was whether a decree-holder, though covered under the definition of 'creditor', fell within the definition of a 'financial creditor' as per of Section 5(7) of the IBC. On a plain reading of the provision, it is clear that 'Financial Creditor' encompasses any person to whom a financial debt is due. It would, therefore, be relevant to ascertain the nature of debt styled as 'financial debt' within the ambit of Section 5(8) of the IBC. Since the initial transaction was an allotment under a real estate project, there could be no doubt that such transaction had the contours of a borrowing as contemplated under Section 5(8)(f) of the IBC. However, the case set up by the Respondents before the NCLT was not on the strength of a transaction having the commercial effect of a borrowing thereby giving them the status of 'financial creditors' but on the strength of being 'decree-holders'. It was noted that, the Respondents had staked claim as 'decree-holders'before the NCLT and therefore they could not later claim to be allottees, classifying the amounts raised from them to have the commercial effect of a borrowing, and hence, cloaking them with the capacity of being 'financial creditors'. Hence, it was required to be determined whether a 'decree-holder' could maintain an application under Section 7 as a 'financial creditor'.

The NCLAT further noted that a 'decree-holder' would undoubtedly be covered by the definition of 'creditor' under Section 3(10) of the IBC, but cannot be classified as a 'Financial Creditor', unless the debt was disbursed against the consideration for time value of money or falls within any of the provisions thereof, as the definition of 'financial debt' is inclusive in character. In the instant case, RERA had conducted the recovery proceedings at the instance of the Respondents against the Corporate Debtor which culminated in the issuance of the Recovery Certificate and passing of an order directing the concerned authority to recover an amount of INR 73,35,686.43 from the Corporate Debtor as arrears towards land revenue. However, instead of pursuing the matter before the competent authority, the Respondents sought to trigger CIRP against the Corporate Debtor. Therefore, the answer to the question on whether a decree-holder would fall within the definition of 'Financial Creditor' in such a scenario had to be an emphatic 'No' as the amount claimed under the decree was an adjudicated amount and not a debt disbursed against the consideration for the time value of money and therefore did not fall within the ambit of any of the provisions under Section 5(8) of the IBC. It was indisputable that the Recovery Certificate sought to be executed was the end product of an adjudicatory mechanism under the Real Estate (Regulation and Development) Act, 2016, and realisation of the amount due under the Recovery Certificate tantamount to recovery effected under a money decree, though the mode of execution was slightly different. In view of the aforesaid observations, the NCLAT was of the view that the application of the Respondents under Section 7 of the IBC was not maintainable.

Decision of the National Company Law Appellate Tribunal, New Delhi

In allowing the appeal, the NCLAT noted that the Respondents could not claim to be allottees of a real estate project after issuance of the Recovery Certificate by UP RERA directing recovery of INR 73,35,686.43 as arrears towards land revenue. The NCLAT stated that the Respondents were decree-holders seeking execution of money due under the Recovery Certificate, which is impermissible within the ambit of Section 7 of the IBC. Therefore, their application for triggering of CIRP was not maintainable as allottees. Decree-holders, though included in the definition of 'creditor', did not fall within the definition of 'financial creditor' and hence a 'decree-holder' could not seek initiation of CIRP as a 'financial creditor'.

In view of the conclusion reached and findings on the issues recorded, the NCLAT was of the opinion that the impugned NCLT Order initiating CIRP against the Corporate Debtor was not sustainable. The NCLAT was also of the firm view that the application of Respondents was moved for execution/recovery of the amount due under the Recovery Certificate and not for insolvency resolution of the Corporate Debtor. The NCLAT was of the view that the said NCLT Order suffered from grave legal infirmity and could not be supported and accordingly set it aside.

VA View:

In passing this judgement, the NCLAT appears to have disregarded the legislative intent and judicial precedents laid down by the NCLAT as well as the Supreme Court with respect to ***K.Kishan v. Vijay Nirman Company [(2018) 150 SCL 110 (SC)].*** It may be noted that in the case of ***M/s. Ugro Capital Limited v. Bangalore Dehydration and Drying Equipment Co. Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 984 of 2019],*** the NCLAT had held that if a petition is filed for recovery of decretal amount, it cannot be dismissed on the ground that the applicant should have filed for execution in a civil court. Although the said judgment was referred by the NCLAT in the present case, it deviated in its view while passing the said order by disqualifying a decree-holder from filing an application under Section 7 of the

IBC on the ground that the amount in a decree is not a financial debt but an adjudicated amount. This is in divergence with the framework under the IBC, which recognises an adjudicated amount to also be a financial debt.

Having said the above, even though there is a similarity that in both the cases, the applicants were decree holders and thereby were attempting to initiate a CIRP, the point to be noted is that the nature of debt in both the decrees' was different. In the present case, the debt arose out of a Builder/Buyer agreement which was not a debt disbursed against the consideration for time value of money but an adjudicated amount. However, in the Ugro Capital's case the debt was disbursed against the consideration for time value of money by the NBFC. Hence the deviance of NCLAT while passing the said order. It will remain to be seen if NCLAT's views in arriving at its decision are upheld or its decision is overruled in subsequent appeal(s), in the event its judgement is appealed before the appropriate forum.

II. Supreme Court: Limitation period for an application under Section 7 of the IBC for initiation of CIRP is three years from the date of default

The Supreme Court of India (**"SC"**) in ***Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Private Limited & Another*** *(decided on August 14, 2020),* held that the limitation period for an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) is three years, as per Article 137 of the Limitation Act, 1963 (**"Limitation Act"**), which commences from the date of default, and is extendable only in those cases where, on facts, the delay in filing may be condoned under Section 5 of the Limitation Act.

Facts

Veer Gurjar Aluminium Industries Private Limited, later represented by the interim resolution professional (**"Respondent No. 1"**) had availed various loans, advances and facilities from lender banks, namely, Corporation Bank, Indian Overseas Bank and Bank of India. Accordingly, various security documents in favour of the lender banks were executed. Respondent No. 1, having defaulted in payment of the amount due, its account with Corporation Bank was classified as Non-Performing Asset (**"NPA"**) on July 8, 2011. Corporation Bank had later assigned the rights in relation to debts of Respondent No. 1 to JM Financial Assets Reconstruction Company Private Limited (**"Respondent No. 2"**). Respondent No. 1 and Respondent No. 2 are hereinafter collectively referred to as **"Respondents"**.

On or about March 21, 2018, during the pendency of proceedings against Respondent No. 1 before the Debts Recovery Tribunal, Aurangabad (**"DRT"**) under the Recovery of Debts Due to the Banks and Financial Institution Act, 1993 (**"DRT Act"**), Respondent No. 2 moved an application before the National Company Law Tribunal, Mumbai (**"NCLT"**) under Section 7 of the IBC, for initiation of Corporate Insolvency Resolution Process (**"CIRP"**) in relation to Respondent No. 1. Point Number 2 of Part III of the said application stated the date of default as July 8, 2011, being the date of NPA. The application was admitted by the NCLT. Aggrieved by this, Shri Babulal Vardhaji Gurjar

(**"Appellant"**), being the director of Respondent No. 1, preferred an appeal before the National Company Law Appellate Tribunal ("**NCLAT"**) contending against the maintainability of the said application. The appeal was summarily dismissed by the NCLAT. Aggrieved by the order of the NCLAT, an appeal was then preferred to the SC.

The SC noted that, in appeal before the NCLAT, one of the grounds agitated was that the claim of Respondent No. 2 was barred by time, as the default was committed on July 8, 2011 and the application was filed in the month of March, 2018. The SC, after finding that the principal issue relating to limitation, though raised, was not decided by the NCLAT, remanded the matter to the NCLAT for specifically dealing with the issue of limitation. After such remand, the NCLAT held that the said application is not barred by limitation on the grounds that, the right to apply under Section 7 of the IBC accrued to Respondent No. 2 only on December 1, 2016, that is, when the IBC came into existence, and, the property of Respondent No. 1 having been mortgaged, the claim is not barred by limitation as per Article 61(b) of the Limitation Act *(providing for period of limitation of twelve years for recovery of possession of the mortgaged property)*. Being aggrieved by this, the Appellant then approached the SC over again.

Issue

Whether the application made by Respondent No. 2 under Section 7 of the IBC for initiation of CIRP is within limitation.

Arguments

<u>Contentions raised by the Appellant:</u>

The learned counsel for the Appellant relied upon the decisions of the SC in ***B.K. Educational Services Private Limited v. Parag Gupta and Associates [AIR (2018) SC 5601]*** and ***K. Sashidhar v. Indian Overseas Bank [(2019) 12 SCC 150]*** and contended that, for an application under Section 7 of the IBC, Article 137 of the Limitation Act *(residuary article providing period of limitation of three years for 'other applications')* is applicable, not Article 61 (b) of the Limitation Act. Accordingly, the limitation period is of three years, which is to be counted from the date of default and if the default had occurred three years prior to the date of filing of the application, the same would not amount to debt due and payable under the IBC. In the application under consideration, Respondent No. 2 mentioned the date of default as July 8, 2011, and, for the evidence of default, only the documents pertaining to the NPA were attached, that is, until the year 2011. Hence, on the averments as taken and evidence as adduced, the application so filed by Respondent No. 2 was clearly barred by limitation.

The Appellant further relied upon ***Jignesh Shah and Another v. Union of India and Another [(2019) 10 SCC 750]*** to state that, the enforcement of the IBC in 2016 will not give a new life to the time-barred debts and if the application is filed beyond three years from the date of default, then the same will be barred by time. It was also contended that, when the said limitation period of three years starts from the date of default, acknowledgment of the debt in the balance sheet will not give any fresh date of default because default occurs only once and cannot be continuing. Reference was also made to the decision of SC in ***Vashdeo R. Bhojwani v. Abhyudaya Co-operative***

Bank Limited and Another [(2019) 9 SCC 158], wherein the SC rejected the contention suggesting continuing cause of action for the purpose of application under Section 7 of the IBC.

Placing reliance on ***Swiss Ribbons Private Limited and Another v. Union of India and Others [(2019) 4 SCC 17],*** the Appellant argued that the legislative policy has moved from "cause of action" to determination of "default" and in the present case, default having occurred when the account became NPA as on July 8, 2011, the application remains barred by limitation.

<u>Contentions raised by the Respondents:</u>

The learned counsel for the Respondents contented that, the liability in relation to the debt in question having been consistently acknowledged by Respondent No. 1 in its balance sheets and annual reports, fresh period of limitation is available from the date of every such acknowledgment and hence, the application is within time. While relying upon ***Jignesh Shah and Another v. Union of India and Another [(2019) 10 SCC 750],*** it was contended that, the provisions of Section 18 of the Limitation Act *(providing for the extension of period of limitation on acknowledgment of the liability)* would certainly extend the period of limitation under the IBC on any acknowledgment of debt by the corporate debtor. Relying upon ***M/s. Mahabir Cold Storage v. CIT, Patna [(1991) Supp (1) SCC 402],*** it was further submitted that the registers of a company are of *prima facie* evidence; and hence the balance sheet disclosing loans and borrowings and forming part of annual returns, continuously from the years 2011 to 2017,would constitute the acknowledgment of the corporate debtor of its indebtedness and the period of limitation will be extended by dint of applicability of Section 18 of the Limitation Act.

It was argued that, Section 238-A *(amendment applying the provisions of the Limitation Act to the IBC)* came into force with effect from June 6, 2018, which was after filing of the application in question; and testing a post facto applicable statutory provision of retrospective nature in a watertight stringent manner would result in a fatal flaw in equity. Reliance was placed on ***N. Balakrishnan v. Krishnamurthy [(1998) 7 SCC 123]*** to submit that the rules of limitation are not meant to destroy the rights of the parties.

Lastly, the learned counsel stated that, the financial creditor has been availing of another civil remedy available to it and had filed the application under Section 19 of the DRT Act well within limitation and the same is still pending and the mere date of default or date of classification of an account as NPA does not put a full stop on 'further cause of action' or 'continuing cause of action' available to the financial creditor. It was further contended that a statute should be interpreted with a view to further its objective, giving effect to the intent of the legislature, and acceptance of the Appellant's contention of filing an application under Section 7 of the IBC within three years from the date of NPA would frustrate the objective of IBC to restructure the stressed assets and ensure maximisation of the value of stressed assets.

Observations of the Supreme Court

The SC firstly referred to its decisions in ***Innoventive Industries Limited. v. ICICI Bank [(2018) 1 SCC 407])*** and ***Swiss Ribbons Private Limited and Another. v. Union of India and Others [(2019) 4 SCC 17]*** to state the relevant basics and scheme of the IBC, upholding the previously established principle that the IBC is a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. As regards to the operation of the law of limitation over the IBC proceedings, the SC referred to ***B.K. Educational Services Private Limited v. Parag Gupta and Associates [AIR (2018) SC 5601],*** wherein it was held that, since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the IBC from the inception of the IBC, Article 137 of the Limitation Act gets attracted. The right to sue therefore accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be time-barred, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act maybe applied to condone the delay in filing. In ***K. Sashidhar v. Indian Overseas Bank [(2019) 12 SCC 150],*** while referring to ***B.K. Educational Services Private Limited v. Parag Gupta and Associates [AIR (2018) SC 5601],*** and explaining the ratio therein, the SC stated that Section 238-A of the IBC was clarificatory in nature and being a procedural law, it had a retrospective effect and taking any other view would result in an incongruous situation as the provisions of the Limitation Act would apply only to some sets of cases to be decided by the same tribunal and not to the other sets.

In ***Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Limited and Another [(2019) 10 SCC 572])*** the SC disapproved the approach of the adjudicating authority in applying Article 62 of the Limitation Act *(providing for period of limitation of twelve years for suits to enforce payment of money secured by a mortgage immovable property)* to an application under Section 7 of the IBC as it applies only to suits. Further, in ***Sagar Sharma and Another v. Phoenix ARC Private Limited and Another [(2019) 10 SCC 353],*** the SC disapproved the proposition that the date of commencement of the IBC could be the starting point of limitation. Relying upon the said judgment, the SC reconfirmed that there is nothing in the IBC to even remotely indicate if the period of limitation for the purpose of an application under Section 7 is to commence from the date of commencement of the IBC itself. Similarly, nothing provided in the Limitation Act could be taken as the basis to support the proposition.

The Respondents had relied upon ***Jignesh Shah and Another v. Union of India and Another [(2019) 10 SCC 750]*** to contend that the provisions of Section 18 of the Limitation Act certainly extend the period of limitation under the IBC on any acknowledgment of debt by the corporate debtor. The SC rejected this contention and observed that, in the said judgment, the SC held that an acknowledgment of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up, would, in no manner, impact the limitation within which the winding-up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding-up proceeding. The illustrative reference to Section 18 of the Limitation Ac tin the said judgement had only been in relation to suit or other proceedings, wherever it could apply, and where the period of limitation could get extended because of acknowledgment of liability. Further, it is evident that in the same judgement, SC had also observed that a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up, would, in no manner, impact the limitation within which the winding up proceeding is to be filed. The observation in relation to the proceeding for winding up, perforce, applies to the application seeking initiation of CIRP under the IBC and accordingly, the observations in the said judgement does not, in any manner, alter the decision by SC in ***B.K. Educational Services Private Limited v. Parag Gupta and Associates [AIR (2018) SC 5601].***

The SC lastly observed that, even if it be assumed that the principles relating to acknowledgement as per Section 18 of the Limitation Act are applicable for extension of time for the purpose of the application under Section 7 of the IBC, the question of limitation is essentially a mixed question of law and facts and when a party seeks application of any particular provision for extension of the period of limitation, the relevant facts are required to be pleaded and requisite evidence is required to be adduced. In the present case, only the date of default as July 8, 2011 has been stated for the purpose of maintaining the application, and not even a foundation is laid in the application for suggesting any acknowledgement or any other date of default. That being the position, the submissions sought to be developed on behalf of Respondent No. 2 at the later stage could not be permitted and no case for extension of period of limitation was available to be examined. Additionally, the SC analysed the reasoning of the NCLAT and determined the primary two reasons that were weighed by the NCLAT to hold the application to be within the limitation period, that is, the right to apply under Section 7 of the IBC accrued when the IBC came into force and that the period of limitation is twelve years as is the case for recovery of possession of the mortgaged property.

Disproving the rationale of the NCLAT, the SC summed up its observations, stating that, when Section 238-A of the IBC is read with the consistent decisions of the SC, the following basics undoubtedly come to the fore:

i. The IBC is a beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation;

ii. CIRP is not intended to be adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor;

iii. The intention of the IBC is not to give a new lease of life to debts which are time-barred;

iv. The period of limitation for an application seeking initiation of CIRP under Section 7 of the IBC is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when right to apply accrues;

v. The trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, that is to say, that the right to apply under the IBC accrues on the date when default occurs;

vi. The default referred to in the IBC is that of actual non-payment by the corporate debtor when a debt has become due and payable;

vii. If default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; and

viii. An application under Section 7 of the IBC is not for enforcement of mortgage liability and Article 62 of the Limitation Act does not apply to the said application.

Decision of the Court

The application made by Respondent No. 2 under Section 7 of the IBC was clearly barred by limitation for having been filed much later than the period of three years from the date of default as stated in the application. Accordingly, SC set aside the order of the NCLT and the NCLAT and held that all the proceedings thereunder shall stand annulled.

VA View

In the present case, while indicating that the essence of the IBC is to ensure the revival of the corporate debtor and not to act as a mere money recovery mechanism, the SC reaffirmed that an application under Section 7 of the IBC for initiation of CIRP against a corporate debtor is governed by the residuary Article 137 of the Limitation Act. Accordingly, the period of limitation for such an application is three years, which commences from the date of default, which is extendable only by application of Section 5 of the Limitation Act if a case for condonation of delay is made out. The SC also reiterated that the date of commencement of the IBC cannot be construed to be the starting point of limitation, thereby giving a new life to time-barred claims.

Furthermore, the SC rejected the argument that the acknowledgement of liability by Respondent No. 1 in its audited balance sheets from the year 2011 until the year 2017 will provide a fresh period of limitation under Section 18 of the Limitation Act. The SC emphasized that the application in question specifically stated the date of default as July 8, 2011, being the date of NPA, and neither any other date of default had been stated in the application nor any suggestion about any acknowledgement had been made. Looking at the very averment regarding default in the application and for want of any other averment regarding acknowledgement, the SC held that no case of extension of limitation was available to be examined.

The reasoning adopted by the NCLAT that the right to apply under Section 7 of the IBC accrued when the IBC came into force; and that the period of limitation is twelve years, which in fact relates to suits for recovery of possession of the mortgaged property, were heavily criticized by the SC for not being in conformity with the pronouncement of the SC as previously laid down in ***B.K. Educational Services Private Limited v. Parag Gupta and Associates [AIR (2018) SC 5601]*** *and* ***Sagar Sharma and Another v. Phoenix Arc Private Limited and Another [(2019) 10 SCC 353].***

III. NCLAT: IBC has no bar for the 'Promoter' to file 'resolution application', even if otherwise not eligible in terms of Section 29A

The National Company Law Appellate Tribunal (**"NCLAT"**) in the case of ***Sreeram E. Techno School Private Limited v. Beans and More Hospitality Private Limited Through R.P. Prabhjit Singh Soni*** *(decided on September 11, 2019)* upheld the order dated July 19, 2019 passed by the NCLT, III bench, Delhi (**"Adjudicating Authority"**) under Section 30(6) of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) and held that IBC has no bar for the 'Promoter' to file 'resolution application', even if otherwise not eligible in terms of Section 29A.

Facts

An application under Section 7 of IBC was filed by Shree Siyaram Automations Private Limited (now Shreeram E Techno School Private Limited) (**"Appellant"**) for initiation of Corporate Insolvency Resolution Process (**"CIRP"**) against Beans and More Hospitality Private Limited (**"Corporate Debtor"**) for a default of INR 90,00,000 (Rupees Ninety Lacs Only) along with interest. The said application for initiation of CIRP was admitted by the Adjudicating Authority by its order dated 13.03.2018 imposing moratorium under Section 14 of IBC and appointing Mr. Prabhjit Singh Soni as the Interim Resolution Professional, who at the first meeting of the Committee of Creditors (**"CoC"**) held on 25.04.2018 was appointed as the Resolution Professional (**"RP"**) in accordance with the provisions of Section 22(3)(a) of IBC.

The RP in furtherance to his duties under Section 25(2)(h) of IBC invited prospective resolution applicants on 31.08.2018. In response to the same, three resolution applicants submitted their Expression of Interest and further submitted their resolution plans. Out of the three plans received, one plan of Mr. Abhay Jain, Ex Director and promoter of the Corporate Debtor was found satisfactory and was discussed fully in the CoC meeting. The RP further examined the said resolution plan submitted by Mr. Abhay Jain and the CoC and the RP found the resolution plan submitted by him to be consistent with Section 30(2) and other provisions of the IBC and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**"CIRP Regulations"**). The resolution plan proposed that the financial creditors are to be paid in full in final settlement of their entire debt against the Corporate Debtor including contingent liabilities and the resolution plan further proposed the continuation of the Corporate Debtor as a "going concern" and previous management would run the Corporate Debtor to make it viable, for the benefit of the society, stakeholders and the government.

The Adjudicating Authority noticed that the resolution applicant had issued an affidavit negating the existence of ineligibility under Section 29A of the IBC. The said resolution plan was duly approved by the CoC by a voting of 74.19% and the RP filed an application before the Adjudicating Authority under Section 30(6) of the IBC read with Regulation 39(4) of the CIRP Regulations seeking approval of the Resolution Plan duly approved by the CoC. The Adjudicating Authority, taking view of the facts that the resolution plan was approved by the CoC is in accordance with Section 30(2) read with Section 31 of IBC, the resolution applicant is not disqualified under Section 29A of IBC and no infirmity seems to have been brought out upon screening of the resolution plan, approved the plan under Section 31(1) of the IBC.

Aggrieved by the said order, the Appellant, one of the 'dissenting financial creditors' challenged the order of the Adjudicating Authority alleging different infirmities and irregularities.

Issue

(i) Whether the resolution applicant, being the erstwhile promoter, is barred from filing of the resolution plan in terms of Section 29A of IBC.

(ii) Whether the issue of viability, feasibility and other conditions of the Corporate Debtor can be looked into by the Adjudicating Authority or by the NCLAT.

Arguments

The submissions of the counsel for the Appellant were:

i. The resolution applicant was the erstwhile promoter and, therefore, is the relevant eligible party under Section 29A of the IBC.

ii. The Corporate Debtor is not a going concern.

iii. Regulation 38 of the CIRP Regulations has not been complied with by the resolution applicant.

Observations of the NCLAT

With regard to the first submission of the counsel for the Appellant, the NCLAT refused to accept such a submission as the IBC has no bar for the promoter to file a resolution application, even if such promoter is ineligible in terms of Section 29A of IBC. Further there is nothing on record to suggest that the Corporate Debtor is an undischarged insolvent or a willful defaulter in accordance with the guidelines of the Reserve Bank of India, issued under the Banking Regulations Act, 1949; or at the time of submission of the resolution plan has an account classified as a 'Non-Performing Asset' in accordance with the guidelines of the Reserve Bank of India; or that the promoter or its directors have been convicted for any offence punishable with imprisonment; or is disqualified to act as a director under the Companies Act, 2013; or was prohibited by the Securities and Exchange Board of India; or made any preferential transaction, an undervalued transaction or granted extortionate credit transaction or entered into a fraudulent transaction, etc.

With regard to the second submission of the counsel for the Appellant, the NCLAT stated that even if Corporate Debtor is not a going concern, a resolution plan cannot be rejected on such ground if the resolution applicant can show the feasibility to run the company in future. The question of viability, feasibility and other conditions as prescribed by the Insolvency and Bankruptcy Board of India of a Corporate Debtor can be looked into by the CoC which has expertise in the financial field. Such issues of viability, feasibility and other conditions of the Corporate Debtor cannot be looked into by the Adjudicating Authority or by the NCLAT. Since the CoC had gone through the financial aspects, including the viability, feasibility and other conditions of the resolution plan and had approved the plan with 74.19% of voting share, the NCLAT was not inclined to decide such an issue.

Further with regard to the third submission of the counsel for the Appellant, the NCLAT noted that the CoC has noticed all the aspects and merely because the Appellant is a dissenting financial creditor, no interference is called for in absence of any illegality.

Decision of the NCLAT

The NCLAT upheld the order of the Adjudicating Authority, approving the resolution plan submitted by the successful resolution applicant and stated that as the successful resolution applicant proposed to pay 100% dues of all the financial creditors with interest including the Appellant, hence no interference is called for and the appeal was dismissed.

VA View

Section 29A of the IBC, being a restrictive provision, determines the eligibility of a prospective resolution applicant in the CIRP of a corporate debtor. IBC in its initial form did not have this provision to prevent any defaulting promoters from bidding for a corporate debtor and hence Section 29A was introduced with the purpose of preventing such defaulting promoters and any such person from participating in the CIRP of the corporate debtor who had contributed in the downfall of the corporate debtor and ultimately restricting them from acquiring the corporate debtor at steep discounts.

In the landmark case of ***Chitra Sharma v. Union of India [Writ Petition (Civil) No. 744 of 2017]*** the Hon'ble Supreme Court of India, while holding the promoters to be ineligible to participate in the CIRP by virtue of Section 29A of IBC, stated that *"accepting the proposal submitted on behalf of JAL would cause serious prejudice to the discipline of the IBC and would set at naught the salutary provisions of the statute."* It further went on to observe that the provision of Section 29A of IBC is intended to ensure that among others, persons responsible for the insolvency of the corporate debtor do not participate in the resolution process.

However, the NCLT, Kolkata in the matter of ***RBL Bank Limited v. MBL Infrastructures Limited [CA(IB) No. 543/KB/2017]*** while dealing with clause (h) of Section 29A was of the view that *"clause (h) of section 29A is not to disqualify the promoters as a class for submitting a resolution plan. The intent is to exclude such class of persons from offering a resolution plan, who on account of their antecedents, may adversely impact the credibility of the processes under the Code".* The NCLT further went on to say that *"in insolvency proceedings, the promoters of Insolvent Company is the most natural person to submit a plan unless the insolvency is caused due to his acts of omission and commission or if he has an indulgence, fraud, malfeasance or other criminal activity and causes financial loss to creditors, knowingly or with criminal intent."* This order was further upheld by the Hon'ble NCLAT as well.

So it can be observed that the Hon'ble NCLAT in the present matter seems to agree with the findings of the Hon'ble NCLT Kolkata in the above referred matter of ***RBL Bank Limited v. MBL Infrastructures Limited [CA(IB) No. 543/KB/2017],*** as in the instant case it stated that, as the resolution applicant, who was also a promoter of the Corporate Debtor, doesn't fall within the restrictive ambit of Section 29A of the IBC, it can be allowed to file its resolution plan in the CIRP of the Corporate Debtor.

IV. Consumer Protection Act, 2019: An analysis

Background

The Consumer Protection Act, 1986 (**"Erstwhile Act"**), was enacted with the sole aim of protecting the interests of the consumers and providing for the establishment of Consumer Councils and authorities for the settlement of consumer disputes and related matters. In today's digital era, we have a myriad of goods and services that can be purchased and availed of globally, through online platforms. This spurt in digitization, has inadvertently engendered newer forms of unfair and unethical trade practices. The urgent need to combat the innate flaws of the Erstwhile Act, while continuing to safeguard consumer interests, keeping in mind the rapidly growing online consumer market, prompted the enactment of the Consumer Protection Act, 2019 (**"New Act"**). Carrying forward the legacy of the Erstwhile Act, the Parliament passed the Consumer Protection Bill, 2019 on August 6, 2019, after which the Presidential assent for the same was received on August 9, 2019, thereby replacing the Erstwhile Act with the New Act. The New Act has been notified and has come into effect from July 20, 2020.

Salient Features

i. *Establishment of the Central Consumer Protection Authority:*

The Central Consumer Protection Authority (**"CCPA"**), headquartered at National Capital Region of Delhi, has been established under the new regime as the Central Authority to regulate matters related to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the rights of consumers.

ii. *Consumer Disputes Redressal Commissions:*

The New Act provides for Consumer Disputes Redressal Commissions at the District, State and National Levels, with enhanced pecuniary jurisdiction. Under the New Act, District Forums have a pecuniary jurisdiction of up to INR 10 million. State Commissions can hear cases involving an amount ranging between INR 10 million and INR 100 million. While National Commissions have a jurisdiction of more than INR 100 million. Additionally, complaints can now be filed by consumers electronically. The New Act provides for hearings to be undertaken in a video-conferencing mode, apart from the existing in-person mode.

iii. *Rights of Consumers:*

The New Act aims to safeguard the following rights of consumers:

1. Right to be protected against the marketing of goods, products or services which are hazardous to life and property;
2. Right to be informed about the quality, quantity, potency, purity, standard and price of goods, products or services to protect the consumer against unfair trade practices;
3. Right to be assured access to a variety of goods, products or services at competitive prices;

4. Right to be heard and assured that consumer interests will receive due consideration at an appropriate forum;

5. Right to seek redressal against unfair trade practice or restrictive trade practices or unscrupulous exploitation of consumers; and

6. Right to consumer awareness

iv. *Unfair Contract:*

The New Act introduces a novel concept of "unfair contract" to mean a contract between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer, including, but no limited to, the following:

1. Requiring manifestly excessive security deposits to be given by a consumer for the performance of contractual obligations;

2. Refusing to accept early repayment of debts on payment of applicable penalty;

3. Allowing a party to the contract to terminate it unilaterally, without reasonable cause;

4. Permitting one party to assign the contract to the detriment of the other party who is a consumer, without his consent;

5. Imposing on the consumer any unreasonable charge, obligation or condition to the disadvantage of such consumer.

v. *Product Liability:*

India has never had any specific legal regime to tackle the issue of product liability. Unlike various international jurisdictions like the U.S., Singapore and Australia, India has never provided for lemon laws, which ensure that consumers have an opportunity to get their defective product rectified, failing which the seller is statutorily obligated to refund them or replace the defective product. The New Act is the first such legislation that introduces penal provisions for product liability claims brought under the instant statute. The concept of product liability has been defined as "*the responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto*". A complaint can be filed under the Consumer Disputes Redressal Commissions for claiming compensation against product liability. The New Act lays down criteria for product liability action such as existence of manufacturing defect and defective design. The New Act, additionally, provides a few defenses to a product liability action such as the product being altered at the time of harm, the complainant used the product under the influence of alcohol, and the product was legally meant to be used under supervision.

vi. *Inclusion of E-Commerce under its Scope:*

The augmented e-commerce transactions and resultant disputes have occasioned the inclusion of e-commerce services under the New Act. The new regime provides for tackling unfair trade practices in e-commerce to protect the interests of the consumers. Under Section 101(2)(zg) of the New Act, the Central Government, via the power conferred on it to make rules, notified the Consumer Protection (E-Commerce) Rules, 2020 (**"Rules"**) on 23 July 2020, in a bid to increase transparency and integrity in the e-commerce transactions. Under the scope of these Rules, the onus lies on the e-commerce entity to disclose information including, but not limited to, its legal name, contact details of customer care, name and details of importer or seller in case of foreign goods. Rule 4 of the Rules imposes duties on e-commerce entities, barring them from resorting to unfair trade practices, manipulating prices of goods and services so as to gain profits and discriminating between consumers.

vii. *Mediation:*

The State Government shall by notification, establish a consumer mediation cell, to be attached to the District and State Commissions of that State. The Central Government shall establish such cell to be attached to the National Commission and its regional benches. The New Act thus provides an alternate approach to dispute resolution through mediation. Via the powers conferred under Section 103 of the New Act, the Central Government brought into force the Consumer Protection (Mediation) Regulations, 2020, that has enumerated criteria for eligibility and disqualifications for empanelment as a mediator. Among other things, it mandates compulsory training for mediators.

Comparative Analysis

The following are the key differences between the Erstwhile Act and the New Act:

i. *Scope of the Statute:*

In light of online platforms rapidly emerging as consumer markets, the New Act under its umbrella, expressly categorizes telecom and housing construction and all modes of transactions (online, teleshopping, etc.) for consideration as 'services' to which the New Act applies. In the Erstwhile Act, there was no explicit mention of online services. An express inclusion of e-commerce and related aspects has been made in the New Act, unlike the Erstwhile Act, where terms like e-commerce and electronic service provider have been defined.

ii. *Inclusions under Unfair Trade Practices:*

The Erstwhile Act included six forms of unfair trade practices such as false representation, misleading advertisements, manufacturing and/or selling spurious goods, etc. The scope of Unfair Trade Practices has been broadened under the new regime, to additionally include failure to issue a bill or receipt, refusal to accept goods returned within thirty days and disclosure of personal information, given in confidence, unless mandated by law or in public interest.

iii. *Provision for Unfair Contracts:*

The New Act provides for a separate category of contracts called unfair contracts, under which six types contracts are enumerated. This bifurcation did not exist in the Erstwhile Act.

iv. *Central Consumer Protection Authority:*

The CCPA has been established under the new regime, as the Central Authority to regulate matters related to violation of rights of consumers. The Erstwhile Act had no such authority.

v. *Consumer Disputes Redressal Commissions: Composition and Appointment*

Under the New Act the Selection Committee has been abolished and members will be appointed by the Central Government. The District Forum will be headed by a president and a minimum of two members. The State and National Commissions will be headed by a president and four members.

vi. *Raising the Pecuniary Jurisdiction*

Under the New Act, the Consumer Disputes Redressal Commissions at the District, State and National levels have enhanced pecuniary jurisdiction, as compared to the Erstwhile Act.

vii. *Mediation as a Method of Dispute Resolution:*

In a first, the New Act provides for settlement of disputes by way of mediation. No such provision existed in the Erstwhile Act.

VA View

The New Act is sure to have a lasting impact on various industrial sectors involved in e-commerce. The food industry and taxi aggregators for example, will be widely affected as an outcome of the New Act. Both classes of consumers- one who purchases or avails goods and services from online markets and one from brick and mortar stores, are equally protected under the New Act. The empowerment of consumers through the New Act will impel corporate entities to increase investments and enhance quality control, so as to avoid unnecessary litigation which could be a possible aftermath of the product liability action introduced under the new regime. This novel concept holds manufacturers, producers and sellers responsible for injury caused to consumers due to defective goods and services.

The cataclysmic circumstances brought about the COVID-19 pandemic have forced nations all over the globe, including India, to declare impending lockdowns. At testing times like these, where distancing in all forms has become the new normal, online transactions have become the new way of life. Protecting consumers who partake in these cashless transactions is of utmost priority and to further this end, the New Act plays an integral role. The inclusion of e-commerce transactions under its aegis has simplified this otherwise herculean task. Unfair trade practices like misleading the public about the price of products, or hoarding goods with the intention to sell them at a higher cost, now, extends to products sold on online platforms as well. Wrongdoers who try to fleece the consumers on various online markets like Amazon and Flipkart, will be subject to scrutiny by the CCPA. Had the current regime not made separate provisions for online transactions, the resultant lack of transparency would have posed a grave threat to consumer interests.

The aim of the New Act is to keep pace with the rapid technological advancements, catering to the current societal needs, which could not be protected by the Erstwhile Act. While the New Act has been well received, there are apprehensions about political interference in appointment of members of the Consumer Disputes Redressal Commissions. Certain service sectors such as the aviation industry, which is in urgent need of stringent consumer laws due to the flamboyant disregard for consumer rights, have been excluded from the New Act. However, apart from these minor discrepancies, the New Act has been widely welcomed due to its pro-active measures in protecting the consumers in this digital age. The paradigm shift from “Caveat Emptor” to “Consumer is King” has been realized to a great extent by the New Act.

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