Between the lines...

December, 2018

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Key Highlights

I. Supreme Court: Submission of revised resolution plan of Ultratech was considered in continuation of the resolution plan already submitted in the insolvency proceedings against Binani Cement Limited

The Supreme Court in the case of ***Binani Industries Limited v. Bank of Baroda and Another*** *(decided on November 19, 2018)* upheld the decision of the National Company Law Appellate Tribunal (**"NCLAT"**) which held that submission of revised resolution plan shall be considered in continuation of the resolution plan already submitted. Further, once the corporate insolvency resolution process (**"CIRP"**) is initiated under the Insolvency and Bankruptcy Code, 2016 (**"Code"**), the corporate debtor cannot repay its dues to seek termination of the CIRP except under certain circumstances.

Facts

Binani Cement Limited (**"Corporate Debtor"**) is a subsidiary of Binani Industries Limited (**"Appellant"**). The National Company Law Tribunal, Kolkata (**"NCLT"**) admitted a petition for initiation of CIRP against the Corporate Debtor in July 2017 as it failed to repay debts due to its creditors. A committee of creditors (**"CoC"**) was constituted which in turn appointed a resolution professional. The resolution professional invited applicants for submission of resolution plans. Accordingly, six resolution applicants including Rajputana Properties Private Limited (**"Rajputana"**) and Ultratech Cement Limited (**"Ultratech"**) submitted their resolution plans. The

resolution plan of Rajputana was approved by the CoC which was tabled before the NCLT for approval under Section 31 (*Approval of resolution plan*) of the Code. Number of objections were filed by the Appellant (for not allowing it to interact with the bidders), Ultratech (for non-consideration of resolution plan) and others before the NCLT.

Observations of the NCLT

The NCLT observed that the CoC in its meeting held on March 14, 2018, after extensive negotiations and consultations, voted in favour of Rajputana with 99.43% and approved the plan submitted by Rajputana. However, 10.53% of the CoC which were forced to vote in favour of the resolution plan recorded a protest note(s) alleging that they had not been dealt with equitably when compared with other financial creditors who were corporate guarantee beneficiaries of the Corporate Debtor. The NCLT also noticed that the resolution plan submitted by Ultratech including revised offer submitted on March 8, 2018 was not properly considered by the CoC for various reasons. The NCLT rejected the resolution plan submitted by Rajputana on the ground that it is discriminatory and contrary to the Code and therefore directed the CoC to reconsider the other plans including the plan submitted by Ultratech. Further, the NCLT also dismissed the objections filed by the Appellant.

Appeal to the NCLAT

Aggrieved by the order of the NCLT, the Appellant filed an appeal with the NCLAT on the ground that the NCLT failed to pass positive directions in its order to allow the Appellant to interact with and/ or meet the bidders/ resolution applicants, financial creditors and other stakeholders of the Corporate Debtor. The Appellant also filed an appeal against the order of the NCLT whereby it refused to accept the proposal of the Appellant for repayment of the dues of the financial creditors and close the CIRP.

Rajputana had filed two appeals in the NCLAT, one against the order of the NCLT, where liberty was granted to the CoC to consider the settlement plan proposed by the Appellant, and second against the order of the NCLT whereby Rajputana's resolution plan was not accepted for various reasons.

Pursuant to the order of the NCLT, the CoC in its meeting dated May 28, 2018 considered the revised plan submitted by Ultratech which was voted with 100% voting shares in favour of Ultratech. The resolution plan was also placed before the NCLAT for appropriate order under Section 31 of the Code.

Issues

1. Whether the resolution plan submitted by Rajputana was discriminatory and against the provisions of Code?
2. Whether the CoC discriminated between the eligible resolution applicants while considering the resolution plan submitted by Rajputana?
3. Whether the Appellant can pay of all dues and seek termination of the CIRP?
4. Whether the resolution plan of Ultratech as approved by the CoC meets the requirement of the Code?

Arguments

Issue 1: Rajputana argued that the resolution plan submitted by it was not discriminatory in respect of the creditors. Export-Import Bank of India (**"Exim Bank"**) was allotted 72.59% of the claim submitted by Exim Bank as the principal borrower was the Appellant, which itself was a non-performing asset and facing proceedings under the Code. With regard to the claim of State Bank of India, Hong Kong, it was submitted that it could not be paid in full as Rajputana was never granted the opportunity to undertake diligence of the underlying plans in China despite repeated requests, thereby depriving them of the opportunity to appropriately analyse its commercial viability.

Exim Bank submitted that they were forced to vote in favour of the resolution plan of Rajputana as it was made clear in the resolution plan that those who did not vote in favour of its resolution plan would be paid liquidation value. Rajputana replied to this stating that the intent of the legislature to bind minority financial creditors with the decision of the majority financial creditors was not based on the basic principle of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

Issue 2: The CoC argued that the revised offer given by Ultratech was merely an e-mail with an offer and that the offer was not made in accordance with the process document and if it is considered as a resolution plan then it would be a deviation of the process laid down in the process document. They also argued that the offer was beyond the time limit as stipulated under the Code. It was further argued that the CoC, the resolution professional and the resolution applicants were bound by the process document prepared under Section 25(2)(h) (*Duties of resolution professional*) of the Code.

Issue 3: The Appellant argued that even during the pendency of the CIRP, it was open to the parties to settle and pay all dues and seek relief of termination of the CIRP of the Corporate Debtor.

Observations of the NCLAT

Issue 1: The NCLAT observed that the resolution plan of Rajputana was discriminatory. Some of the financial creditors had direct exposure to the Corporate Debtor or the Corporate Debtor was a guarantor to some of the financial creditors. Even the guarantors who are treated to be financial creditors, such as IDBI Bank Limited, Dubai; Bank of Baroda, London; State Bank of India, Bahrain; Syndicate Bank have been provided with 100% proposed payment of their verified claim but the Exim Bank and the State Bank of India, Hong Kong who are similarly situated have been discriminated. The NCLAT further observed that the operational creditors, who were unrelated parties, were provided with 35% of their verified claim whereas operational creditors who were related parties were not provided with any amount.

Reliance was placed on the decision of the NCLAT in the case of ***Central Bank of India v. Resolution Professional of the Sirpur Paper Mills Limited and Others [Company Appeal (AT) (Insolvency) No. 526 of 2018]*** which held that legislators did not make any discrimination between the same set of groups such as financial creditors or operational creditors. Any resolution plan which provides for liquidation value to the operational creditors or liquidation value to

the dissenting financial creditors without any reason to discriminate between two sets of creditors similarly situated, cannot be approved.

The NCLAT held that approving the resolution plan under Section 53 (*Distribution of assets*) of the Code does not mean that a discriminatory plan can be placed and can be got through on one or other ground, which is against the basic object of maximization of the assets of the 'Corporate Debtor' on one hand and for balancing the stakeholders on the other hand. In view of the same, the NCLAT concluded that resolution plan submitted by Rajputana was discriminatory and against the provisions of the Code.

Issue 2: The NCLAT observed that the process document issued on December 20, 2017 *inter alia* stipulated general and qualitative parameters and that the CoC will negotiate only with the resolution applicant which reveals the highest score based on the evaluation criteria and whose resolution plan was in compliance with the requirements of the Code. Since the resolution professional and the CoC are duty bound to ensure value maximisation within the prescribed time frame under Code, in the present case, the CoC not only failed to safeguard the interest of the stakeholders of the Corporate Debtor but also ignored the revised resolution plan of Ultratech, which ensured maximization of the assets of the Corporate Debtor as well as balanced the claim of all the stakeholders of the Corporate Debtor. Submission of a revised offer was in continuation of the resolution plan already submitted and accepted by the resolution professional. Further, the CoC had taken note of the revised offer given by Rajputana on March 7, 2018, but refused to notice the revised offer submitted by Ultratech on March 8, 2018, which was much prior to the decision of the CoC on March 14, 2018. Since Ultratech submitted their resolution plan within the time frame on February 12, 2018, it was open to the CoC to notice the revised offer given by Ultratech. The NCLAT appreciated the argument that the CoC, the resolution professional and the resolution applicants were bound by the process document prepared under Section 25(2)(h) of the Code but stated that non-adherence to the process stipulated in terms of Section 25(2)(h) of the Code and to stipulation made in the process document would render such a decision illegal. In view of the aforesaid, the NCLAT observed that the direction of the NCLT to the CoC to reconsider the resolution plan submitted by Ultratech cannot be held to be illegal.

Issue 3: The NCLAT stated that once the CIRP is initiated by admitting an application under Sections 7, 9 or 10 of the Code, it can neither be withdrawn nor can be set aside, except for illegality to be shown or if it is without jurisdiction or for some other valid reason. A CIRP cannot be set aside on the ground that the promoter wants to pay all dues including the default amount. Section 12A of the Code came into force on June 6, 2018 which provides that the NCLT may allow withdrawal of application admitted under Sections 7, 9 or 10, on an application made by the applicant with the approval of at least 90% voting share of the committee of creditors. In the present matter, since the Appellant had not filed an application for withdrawal after approval of at least 90% voting share of the CoC, it was not open to the Appellant to take advantage of Section 12A of the Code. It was further stated that even if the Appellant settled the matter, the CIRP could not be terminated by the adjudicating authority or the appellate authority in the absence of any illegality.

Issue 4: The NCLAT observed that the resolution plan submitted by Ultratech meets the requirement under Section 30(2) (*Submission of resolution plan*) of the Code and thereby approved the plan and held it to be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders.

Decision of the Supreme Court

An order passed by the NCLAT on November 14, 2018 was appealed in the Supreme Court. The Supreme Court having perused the judgments of the NCLT and the NCLAT and after hearing learned counsel for all the parties, held that there is no infirmity in the order passed by the NCLAT.

VA View

The judgment in respect of Binani Cement Limited is a welcome decision for multiple reasons. Major questions of law were dwelled upon especially in respect to consideration of a revised bid of a resolution applicant which was initially not declared as the highest bidder. The NCLAT in this judgment has stated that in view of the value maximisation, revised bid of Ultratech ought to have been considered as the CoC had not given its approval to any resolution plan submitted by the resolution applicants when the said revised bid was submitted.

It is pertinent to note that the value maximisation does not only mean the highest bid amount but also the best possible way to pay the debts of the creditors. After this judgment, it can now be said that the CoC should ensure that the resolution plan not only complies with the provisions under Section 30(2) of the Code and the process document issued, but should also ensure maximisation of value in all aspects. The judgment also rules against discrimination. It is often seen that the resolution applicants want to take care of the creditors whose voting power matters and ignore the others, which is against the spirit of the Code. In our view, this landmark judgment has had significant contribution in evolving the jurisprudence in respect of the Code.

II. Supreme Court: Furnishing original copy of arbitration agreement while filing application for enforcement of foreign award is not mandatory

The Supreme Court in ***P.E.C. Limited v. Austbulk Shipping SDN BHD*** (*decided on November 14, 2018*) held that the requirement to submit the original arbitration agreement at the time of making an application for enforcement of an arbitration award is not mandatory but directory in nature. The Supreme Court also stated that signing an agreement is not essential to prove the existence of an arbitration agreement. Other communications between the parties can also be relied on to prove that an arrangement to refer disputes to arbitration existed.

Facts

P.E.C. Limited (**"Appellant"**) and Austbulk Shipping SDN BHD (**"Respondent"**) had entered into a charter party agreement in the year 2000. The Appellant chartered MV "Rubin Halycon", a bulk carrier, from the Respondent for

transportation of chickpeas in bulk from Australia to Jawaharlal Nehru Port, India. When the carrier reached the port in India, the Appellant requested the Respondent to change the discharge port. The Respondent obliged with this request and forwarded the statement of amount due to them due to the change of port and demurrage charges. As no payment was made in terms of the request of the Respondent, they invoked the arbitration clause in the charter party agreement and appointed an arbitrator. An *ex parte* foreign arbitral award was passed in favour of the Respondent.

In 2001, the Respondent filed a petition for enforcement of the award in Delhi High Court. The Appellant filed its objections to the enforcement petition. The two objections of the Appellant were rejected by the Delhi High Court which resulted in an appeal before the Supreme Court wherein the following two issues were under consideration:

Issues

1. Whether an application for enforcement under Section 47 of the Arbitration and Conciliation Act, 1996 (**"Arbitration Act"**) is liable to be dismissed if it is not accompanied by the arbitration agreement?
2. Whether there is a valid arbitration agreement between the parties and what is the effect of a party not signing the charter party agreement?

Relevant provisions

Section 47(1) of the Arbitration Act:

The party applying for the enforcement of a foreign award **shall**, at the time of the application, produce before the court—

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) **the original agreement for arbitration or a duly certified copy thereof**; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

Arguments

The Appellant argued that it is mandatory for the party applying for enforcement of a foreign award to produce the original agreement for arbitration before the court at the time of filing the application. The mandatory nature of the obligation can be construed by the usage of the word "shall" in Section 47 of the Arbitration Act. Since the Respondent failed to produce the original arbitration agreement at the time of making the application for enforcement of the foreign award, such an application should have been dismissed. The Respondent also canvassed the argument that the Appellant did not sign the charter party agreement and there was no arbitration agreement between the parties. Therefore, the arbitral proceedings themselves suffer from the vice of lack of jurisdiction.

The arguments of the Respondent were not discussed in the judgment.

Observations of the Supreme Court

The Supreme Court analysed the mandatory character of the requirement under Section 47(1)(b) of the Arbitration Act that the Appellant strongly championed. The Supreme Court held that even though the word "shall" in its ordinary import is obligatory in nature, there are many decisions wherein the courts under different situations construed the word to mean "may". In order to determine the directory or mandatory character of a statute, the courts must endeavour to understand the real intention of the legislature by carefully examining its purpose and scope. While acknowledging Article IV of the Convention on the Recognition & Enforcement of Foreign Arbitration Awards, 1958 (**"New York Convention"**), which states that the party applying for recognition and enforcement of a foreign enforcement award shall file the original agreement with the court, it also cited Article III of the New York Convention which restricts imposition of substantial onerous conditions for enforcement of the arbitral awards. The Supreme Court also highlighted the object and purpose of the New York Convention which emphasised on the pro-enforcement bias with which the New York Convention has to be applied. The Supreme Court stated that several countries have been liberal in interpreting the formal requirements of Article IV of the New York Convention. Excessive formalism in the matter of enforcement of foreign awards has also been deprecated. Further, even the United Nations Commission on International Trade Law (UNCITRAL) Model law on International Commercial Arbitration, which has been adopted by way of the Arbitration Act, has liberalized several formal requirements and now does not require presentation of the original or copy of the arbitration agreement at the time of filing an application for enforcement. The Supreme Court additionally held that no prejudice was caused to the Respondent by the non-filing of the original arbitration agreement at the time of making the application for enforcement. Therefore, owing to these numerous reasons, the requirement under Section 47(1)(b) of the Arbitration Act was held not to be mandatory in nature.

Addressing the argument of the Appellant that they had not signed the arbitration agreement, the Supreme Court stipulated that an arbitral clause need not necessarily be found in a contract or an arbitration agreement. It can be included in the correspondence between the parties also. Since, in this case through the correspondence of the parties an agreement to arbitrate could be extrapolated, the Supreme Court held that there existed a valid arbitration agreement between the parties.

Decision

The Supreme Court held that furnishing of the original arbitration agreement at the time of filing of the application for enforcement of foreign award is not a mandatory requirement under the Arbitration Act. The Supreme Court also held that an arbitration agreement existed on the basis of the communication exchanged between the parties.

VA View

In a pro-arbitration judgement that does not miss the woods for the trees, the requirement to submit the original arbitration agreement while filing for an application to enforce a foreign arbitration award has been relaxed by the Supreme Court. This judgement is in line with Section 48 of the Arbitration Act which provides the grounds under which the party against whom the arbitration award was passed can request the court to refuse the enforcement of such an award. Those grounds include (i) incapacity of parties; (ii) invalid arbitration agreement; (iii) failure to submit proper notice to party against whom the award was made; (iv) subject matter of dispute not covered in arbitration agreement; (v) composition of tribunal or arbitral procedure being unlawful; and (vi) award not being binding or set aside by country in which it was passed.

It can be noted that the failure of the arbitral awardee to submit the original arbitration award is conspicuously absent as a ground for rejection of application of enforcement. Therefore, apart from being a procedural requirement, its non-compliance cannot stand in the way of enforcement of a valid arbitration award. It is important to note that while removing unnecessary impediments in the enforcement of an arbitration award, the Supreme Court ensured that the interest of the enforcing party were not prejudiced in any manner. Additionally, the Supreme Court also held that signing of the charter party agreement was not necessary to establish the existence of an arbitration agreement. What is required to be ascertained is whether the parties have agreed in writing that if a dispute arises between them in respect of the subject matter of contract, such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement. Such an agreement in writing can be deduced from different communications between the parties such as letter, e-mails and similar correspondences.

III. NCLAT: Application under Section 7 of the Insolvency and Bankruptcy Code maintainable jointly against two corporate debtors if they collaborate and form an independent corporate entity

The National Company Law Appellate Tribunal (**"NCLAT"**) in the case of ***Mrs. Mamatha v. AMB Infrabuild Private Limited and Others*** (*decided on November 30, 2018*) held that if two corporate debtors collaborate and form an independent corporate entity, an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (**"Code"**) can be maintainable against both the corporate debtors, jointly and not independently.

Facts

AMB Infrabuild Private Limited (**"Owner"**) and Earth Galleria Private Limited (**"Developer"**) (collectively referred to as **"Respondents"**) had entered into a collaboration agreement on May 3, 2013, for development of a piece of land. Thereafter, a Memorandum of Understanding (**"MoU 1"**) was reached on June 20, 2014 between Earth

Infrastructure Limited and Mrs. Mamatha, an allottee of the project (**"Appellant"**), in respect to booking of Cineplex for which a sale consideration of INR 3,00,00,000 and advance of INR 5,00,000 were paid. Subsequently, the Appellant also entered into another Memorandum of Understanding (**"MoU 2"**) with Respondents on February 6, 2016 where the Owner and the Developer were jointly referred to as the 'Company'. No construction work was started by the Developer. The Developer had also not executed any agreement for sale in respect of the Cineplex. On issuance of a legal notice by the Appellant, the Respondents have agreed to remit a monthly assured return in respect of the consideration paid by the Appellant. The assured returns were paid only for a certain period of time and thereafter the Respondents stopped paying returns to the Appellant.

The Appellant approached the National Company Law Tribunal, New Delhi (**"NCLT"**) seeking to initiate corporate insolvency resolution process against both the Owner and the Developer by filing an application under Section 7 of the Code. The NCLT rejected the application observing that payment by the Appellant has been made to the Developer while the corporate insolvency resolution process has been initiated against both the Owner and the Developer. It further observed that the Code contains no provision under which corporate insolvency resolution process can be initiated against two corporate debtors who have collaborated for a joint venture. Aggrieved by the order of the NCLT, the Appellant preferred an appeal to the NCLAT, where the following issue came up for determination:

Issue

Whether corporate insolvency resolution process initiated under the Code is maintainable against two corporate debtors who have collaborated for a joint venture project?

Relevant Clauses of the collaboration agreement and MoU 2 between the parties:

The collaboration agreement between the Owner and the Developer:

- *The Developer has received to undertake the development of a commercial complex on collaboration basis on the said land at Developer's expense and to share the saleable area as mentioned hereunder amongst themselves.*
- *That the Owner through this agreement shall devolve all necessary rights and entitlements on the Developer to build upon the said land proposed Commercial Complex in accordance with the terms of this agreement and to own as property belonging to the Developer or dispose of the whole of its share of the built up area of the said Commercial Complex as provided herein with proportionate share in the land underneath the said Commercial Complex as also the right to use the common areas and the common facilities.*
- *Developer shall be entitled to advertise the project in electronic and printed media as well as by distributing pamphlets, brochures, publishing advertisement in newspapers, magazines etc. by putting sign-boards, neon-signs on the said Project, and other places, in any manner as Developer may deem fit and proper and thus it*

shall be entitled to create awareness about the Commercial Project and to invite buyers, customers and brokers to the site. The marketing/advertisement costs shall be borne by the Developer. It is further agreed that all the advertisements got published by the Developer for the project shall specifically state that the project is being developed by the Developer in collaboration with the Owner.

The MoU 2 between the Owner, the Developer and the Appellant:

- *The Developer and Land Owner are jointly referred to as the Company.*

Arguments

The principal argument of the Respondents was that Section 7 of the Code does not allow for an application against two corporate debtors who have collaborated for a joint venture. The Respondents submitted that in the MoU 1 relied upon by the Appellant, the Owner is not a party and hence the application is not maintainable under the Code. On the other hand, the Petitioner contended that a Section 7 application against multiple corporate debtors can be permitted under the Code depending on the facts and circumstances of the case.

Observations of the NCLAT

The NCLAT observed that collaboration agreement reached between the Owner and the Developer provided that the Developer will sell the flats to the extent of its own shares and the Owner will sell the developed portion of its own shares. The Owner had agreed to make and treat it as a joint venture project for all the purposes. Further, the collaboration agreement empowered the Developer to advertise the project and to market the developed property as a 'Joint Venture Project' on behalf of the joint venture between the Developer and the Owner. In view of the same, the NCLAT observed that if the MoU 1 has been entered into between the Appellant and Earth Infrastructure Limited, the Developer cannot take a plea that it is not a signatory to the MoU 1, where the Developer is represented by Earth Infrastructure Limited pursuant to the collaboration agreement between the Owner and the Developer.

The NCLAT, after perusal of various clauses of the collaboration agreement, MoU 1 and MoU 2 observed that the two corporate entities (the Owner and the Developer) have formed an individual corporate unit entity for development of the land and allotment of the premises to the Appellant and hence an application under Section 7 of the Code will be maintainable against both the Owner and the Developer jointly and not individually against one or other. In other words, both the Developer and the Owner, if they are corporate entities, they should be jointly treated to be one for the purpose of initiation of corporate insolvency resolution process against them.

Decision of the NCLAT

The NCLAT reversed the ruling of the NCLT which rejected the Section 7 application under the Code and remitted the case back to NCLT for admission.

VA View

The NCLAT in this judgement has clarified that an application for corporate insolvency resolution process can even be initiated against more than one corporate debtor, provided they have collaborated amongst themselves for the purpose of a project/transaction. It is imperative to note that the NCLAT has not laid down any strait jacket formula for determining as to what would constitute as "collaboration" among multiple corporate debtors and this would have to be determined according to the facts and circumstances of each case. However, the same can become a contentious issue for the adjudicatory authorities to determine in future similar cases.

The order of the NCLAT is particularly relevant in the context of initiating corporate insolvency resolution process against unincorporated joint venture entities. The term 'Joint Venture' has been defined under the Companies Act, 2013 to mean "a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement". Unincorporated joint ventures, though can be constituted by two or more "companies" (defined under Section 2(20) of the Companies Act, 2013) but that joint venture in itself, is not a separate legal entity and does not fall under the definition of a "corporate person" and consequently is outside the scope of the Code as an insolvency process can only be initiated against a person within the meaning of a "corporate debtor". This judgment will prove to be beneficial for the creditors in such cases who will be spared the burden of filing multiple Section 7 applications and pursuing independent litigation in respect of each of them, thus saving the time and money of both themselves as well as that of the adjudicatory authorities.

It will be interesting to know the fate of this judgment which is in appeal before the Hon'ble Supreme Court of India.

IV. NCLAT: Pendency of proceedings under Section 138 and Section 141 of the Negotiable Instruments Act, 1881 does not amount to existence of a dispute

The National Company Law Appellate Tribunal (**"NCLAT"**) in case of ***Sudhi Sachdev v. APPL Industries Limited*** (*decided on November 13, 2018*) held that the pendency of a case under Sections 138 and 141 of the Negotiable Instruments Act, 1881 (**"NI Act"**) would amount to admission of a debt and not existence of a dispute under the Insolvency and Bankruptcy Code, 2016 (**"Code"**).

Facts

APPL Industries Limited (**"Respondent"**) an operational creditor of M/s. Auto Décor Private Limited (**"Corporate Debtor"**) filed an application for the initiation of corporate insolvency resolution process (**"CIRP"**) against the Corporate Debtor for an amount of INR 34,25,251 before the National Company Law Tribunal, New Delhi (**"NCLT"**), which was subsequently admitted.

Prior to the application for insolvency, the Respondent had pursued a case under Sections 138 and 141 of the NI Act with regard to 51 cheques, amounting to a total sum of INR 66,10,776 issued by the Corporate Debtor in favour of the Respondent. During the pendency of the proceedings under the NI Act, the Corporate Debtor repaid the sum of INR 31,85,525, resulting in the total outstanding debt of INR 34,25,251. This appeal to the NCLAT was filed by Sudhi Sachdev (**"Appellant"**), a promoter of the Corporate Debtor and following issue came up for determination:

Issue

Whether the pendency of a case under Sections 138 and 141 of the NI Act would amount to existence of a dispute under the Code?

Arguments

The Appellant who appeared *ex parte* relied on the judgement of the Supreme Court in case of ***R. Vijayan v. Baby and Others [(2012) 1 SCC 260]*** and contended that proceedings under Sections 138 and 141 of the NI Act are essentially civil cases for recovery of money which would amount to a 'dispute' as defined in Section 5(6) of the Code, and therefore an application filed under Section 9 of the Code would not be maintainable.

Observations of the NCLAT

The NCLAT observed that as per the precedent laid down by the Supreme Court in ***Innoventive Industries Limited v. ICICI Bank and Others [(2018)1 SCC 407],*** the existence of a dispute or the record of pendency of a suit or arbitration proceedings would remove the Corporate Debtor from the purview of the Code. The NCLAT observed the fact that there is an outstanding debt payable to the Respondent by the Corporate Debtor which is not in dispute. Further, the proceedings under Sections 138 and 141 of the NI Act would only amount to recovery proceedings, which would be an admission of debt and not an existence of dispute.

Decision of the NCLAT

The NCLAT dismissed the appeal.

VA View

The view of the NCLAT will amount to operational creditors having the ability to pursue cases simultaneously under Sections 138 and 141 of the NI Act and Section 9 of the Code.

However, it must be considered that the provisions under the NI Act and the Code are fundamentally different in nature, and the ruling of the NCLAT that pendency of proceedings under Sections 138 and 141 of the NI Act would amount to the existence of a debt may not be true in all cases depending on the factual matrix of individual cases. The Kolkata bench of the NCLT, in case of ***Naviplast Traders Private Limited and Others v. M/s. R G Shaw and Sons***

Private Limited (*decided on April 12, 2017*) also ruled that proceeding under Sections 138 and 141 of the NI Act is a "different proceeding" than that under the Code "as liability occurs when a cheque is dishonoured". Under the provisions of Sections 138 and 141 of the NI Act, the occurrence of a 'dispute' is not mandatory, and Sections 138 and 141 seek to penalize a drawer of a fraudulent cheque.

This ruling may result in formation of a pigeonholed view, and every individual and body corporate with pending proceedings under Sections 138 and 141 of the NI Act may use the precedent set above to approach the NCLT for commencement of corporate insolvency resolution process, regardless of the existence of dispute and the intention behind writing the cheque.

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