Between the lines...

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Key Highlights

I. Challenge to resolution plan by SEBI dismissed by National Company Law Appellate Tribunal

National Company Law Appellate Tribunal (**"NCLAT"**) in ***Securities and Exchange Board of India v. Assam Company India Limited and Others*** *(decided on August 29, 2019)* held that a resolution plan requiring delisting of shares of the corporate debtor against which Securities Appellate Tribunal (**"SAT"**) had passed an interim order would be valid.

Facts

After a Corporate Insolvency Resolution Process (**"CIRP"**) was initiated against Assam Company India Limited (**"Corporate Debtor"**), by an order dated September 20, 2018, National Company Law Tribunal, Guwahati Bench (**"NCLT Guwahati"**) approved the resolution plan submitted by BRS Ventures Investment Limited (**"Successful Resolution Applicant"**). Securities and Exchange Board of India (**"SEBI"**) challenged the order of approval of the said resolution plan as the said resolution plan provided for delisting the shares of the Corporate Debtor.

Before the initiation of the CIRP, SEBI had received a letter from the Ministry of Corporate Affairs (**"MCA"**) dated June 09, 2017 (**"MCA Letter"**) along with a copy of letter dated May 23, 2017 from Serious Fraud Investigation Office (**"SFIO"**) annexing a list of 331 shell companies, the Corporate Debtor being one of them. Accordingly, SEBI issued interim directions to the concerned stock exchanges to take certain actions against the Corporate Debtor. This prompted the Corporate Debtor to approach SAT which resulted in an adverse interim order by the SAT requiring a forensic audit to be conducted on the Corporate Debtor. Various opportunities were given thereafter to the Corporate Debtor to file its reply or objections to the said interim order, however it failed to do so. Instead, the Corporate Debtor filed a writ petition before the Guwahati High Court challenging the MCA Letter wherein the Guwahati High Court set aside the MCA Letter. SEBI

challenged the said order before a larger bench of the Guwahati High Court. Thereafter, SEBI received an intimation from the stock exchanges that NCLT Guwahati had approved a resolution plan which provided for delisting of the equity shares of the Corporate Debtor. Aggrieved by the approval of the resolution plan, SEBI approached the NCLAT.

Issue

Whether the order of NCLT Guwahati approving the resolution plan of the Corporate Debtor should be reversed?

Arguments

The counsel for SEBI submitted that the approved resolution plan had the effect of denuding the jurisdiction of SEBI under the provisions of the Securities and Exchange Board of India Act, 1992 (**"SEBI Act"**) in an indirect manner. Further, the Corporate Debtor had not taken any steps to file a reply or objections to the interim order of the SAT. All of this contravenes SEBI Act and would accordingly be hit by Section 30(2)(e) of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**). It was also argued that the effect of the impugned clause in the resolution plan was that the equity shares of the Corporate Debtor shall stand delisted from the concerned stock exchanges which will not only render the action initiated by SEBI in conjunction with the said stock exchanges against the Corporate Debtor, nugatory and ineffective, but also compel public shareholders to exit for a very meagre amount, which would not be in the interest of investors and the securities market. The investigations of SEBI under the provisions of the SEBI Act and the regulations made thereunder, other laws specified in the secretarial audit report and prima facie observations regarding misuse of books of funds by the Corporate Debtor ought not be permitted to be scuttled by adopting the method of delisting of the equity shares of the Corporate Debtor, by way of approval of the resolution plan in an attempt to wriggle out of the jurisdiction of and proceedings instituted by SEBI. Additionally, the resolution plan should not have been proceeded without a right to be heard being given to SEBI. Further, it was also submitted that the Single Judge of the Guwahati High Court had only quashed the MCA Letter and not the letter of the SFIO.

It was argued for the Corporate Debtor and the Successful Resolution Applicant that the sole ground taken by SEBI was that there are pending investigations initiated against the Corporate Debtor as a shell company and therefore the delisting of equity shares should not be allowed in terms of the resolution plan. However, the Guwahati High Court had already set aside the investigation. In the appeal filed by SEBI against the order of the Guwahati High Court, no order of stay had been passed. Further, the Corporate Debtor cannot be treated as a shell company after it has been taken over by Successful Resolution Applicant pursuant to the resolution plan. It was submitted that apart from protecting rights of all the stakeholders including financial creditors and operational creditors, the rights of public shareholders had also been protected. The liquidation value of the Corporate Debtor would be much lower than the amount payable to financial creditors and therefore the liquidation value of the Corporate Debtor had been assessed to be NIL. Further, the Successful Resolution Applicant in its plan has provided a sum of INR 1.82 crores for the public shareholders which is in consonance with the Gazette Notification dated May 31, 2018 issued by SEBI for delisting of shares pursuant to the resolution plan approved under Section 31 of the IBC. The resolution plan provided for exit route to the public shareholders by earmarking INR 1.82 crores for cancellation of their shares and no individual and/or entity having any dues had been deprived of any amount under the approved resolution plan.

Since the approved resolution plan had taken care of interest of the public shareholders and all the stakeholders, the apprehension of SEBI was completely misplaced.

Findings of the NCLAT

NCLAT referred to the relevant portions of the resolution plan submitted by the Successful Resolution Applicant concerning the delisting of the shares of the Corporate Debtor. It also referred to Section 30(2)(e) and Section 32 read with Section 61 of the IBC which deal with approvals of resolution plans and appeals from order approving the resolution plan. One of the grounds for examining a resolution plan and where an appeal can be filed against an order approving a resolution plan is if the said resolution plan is in contravention of the provisions of any law for the time being in force. The argument of SEBI was that the resolution plan was against the interim order of SAT. NCLAT held that such alleged violation of the interim order passed by SEBI cannot be held to be as against 'any existing provision of law'. Accordingly, the appeal against the order of NCLT, Guwahati is not maintainable.

However, NCLAT stated that its order shall not come in the way of SEBI or any competent authority taking any steps against erstwhile promoters, directors or officers of the Corporate Debtor, if any or all of them had violated any of the provisions under the SEBI Act or rules framed thereunder or under any other law.

Decision of the NCLAT

NCLAT upheld the order of NCLT, Guwahati approving the resolution plan submitted by the Successful Resolution Applicant and dismissed the appeal filed by SEBI.

VA View

This judgement comes at a time where an IBC v. SEBI dispute is *sub judice* in an appeal before the Supreme Court resulting from the judgement of NCLT, Principal Bench in ***Bhanu Ram v. HBN Dairies and Allied Limited*** *(decided on April 30, 2019).* In the said case, the properties of the corporate debtor had been attached by SEBI. CIRP was initiated against the corporate debtor and due to the coming in force of a moratorium on the assets of the corporate debtor, after the initiation of CIRP, SEBI was directed to detach the properties of the corporate debtor. NCLT in the said case held that due to the non-obstante clause in the IBC, provisions of IBC would prevail over the provisions of SEBI and hence the properties of the corporate debtor should be detached. Aggrieved by this order, an appeal has been filed before the Supreme Court by SEBI in the case of ***SEBI v. Rohit Sehgal and Others.***

In the instant case, NCLAT has interpreted Section 61(3)(i) of the IBC which provides that if a resolution plan is in contravention of any of the provisions of any law for the time being in force, an appeal can be preferred against an order approving such a resolution plan. As per this judgement, an alleged violation of the SAT interim order does not qualify as a violation of the law in force. It is curious to note that NCLAT has not made any observations regarding the appeal filed against the order of the Single Judge Bench of the Guwahati High Court by SEBI.

The apex Court's decision in the appeal preferred in the case of ***SEBI v. Rohit Sehgal and Others*** may ultimately resolve the conflict between the contradictory provisions of the SEBI Act and the IBC.

II. Delhi High Court: Creditors cannot be given preferential treatment towards satisfaction of a compromise decree during moratorium

The Delhi High Court (**"DHC"**) has, in the case of ***Ved Prakash Abbot v. Kishore K. Avarsekar and Others*** *(decided on August 09, 2019)* held while dismissing a contempt petition that pending moratorium under the Insolvency and Bankruptcy Code, 2016 (**"IBC"**), creditors cannot be given preferential treatment towards satisfaction of a compromise decree.

Facts

Ved Prakash Abbot (**"Petitioner"**) had filed a suit for recovery of dues against a Company (**"Company"**) owned by Kishore K. Avarsekar (**"Respondent"**). However, the parties reached a compromise and a compromise decree was passed that recorded the terms of the same, where the Company was directed to pay a sum of INR 10,19,763 in monthly instalments. However, on June 20, 2017 an interim resolution professional was appointed, as an application under Section 10 of the IBC for initiation of the corporate insolvency resolution process (**"CIRP"**) was made. Thus, moratorium was imposed as per Section 14 of the IBC. Subsequently, the cheque for the second instalment was dishonoured. On March 20, 2018 an application for liquidation was passed and a liquidator was appointed. Further, a contempt petition was filed by the Petitioner where it was alleged that the Company and the Respondent have committed a contempt of the compromise decree by not repaying the sum in the manner provided.

Issue

Whether the compromise decree could be honoured in view of the initiation of the CIRP as per the IBC?

Arguments

The Petitioner argued that there was a wilful disobedience of the compromise decree previously passed. The Petitioner further submitted that even prior to the appointment of the interim resolution professional and initiation of moratorium as per Section 14 of the IBC, the Respondents defaulted on two of the payments due and therefore it could be inferred that the Respondents reflected no intention to abide by the terms of the compromise decree. It was further contended that Section 14 of the IBC does not have any impact on the contempt proceedings before a High Court under Article 215 of the Constitution of India and the Contempt of Courts Act, 1971. The Delhi High Court's judgement in the case of ***E.D. v. Axis Bank*** *(decided on April 02, 2019)* was interpreted and analysed where it was held that provisions of Section 14 of the IBC are not applicable to a statutory authority under the Prevention of Money Laundering Act, which would apply to the instant case. Other judgements such as ***Delhi Development Authority v. Skipper Construction Company (Private) Limited and Others [(1996) 4 SCC 622]*** and ***Jyoti Limited v. Kanwaljit Kaur Bhasin [32 (1987) DLT 198]*** were referred to in order to state that as per the principle of 'lifting the corporate veil' the directors and other officers in-charge have been previously held responsible for the acts and/or omissions of companies.

The Respondent's main argument was centred on the definition of 'civil contempt' as per Section 2(b) of the Contempt of Courts Act, 1971. Section 2(b) of the Contempt of Courts Act, 1971 is reproduced below:

> *"(b) "civil contempt" means wilful disobedience to any judgement, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;"*

The Respondent thereby argued that in order to qualify as a contempt of court, there shall have to be a 'wilful' disobedience or breach. The Respondent further stated that prior to the initiation of the CIRP, it was not in a financial position to repay the amounts. After initiation of the CIRP, an interim resolution professional was appointed who took over the management of the Company and was vested with the power of the board of directors of the Company. The Respondent contended that he had certainly not benefited from the Company going under the CIRP as he actually lost control of the Company with the appointment of the interim resolution professional. The Respondent further submitted that the Petitioner is entitled to the satisfaction of the decree only through the route of proceedings under the aegis of the IBC. Further, paying the Petitioner's dues before paying the dues owed to the 328 other operational creditors would amount to preferential treatment of a particular creditor. The Respondent cited the Supreme Court's judgement in the case of ***Ashok Paper Kamgar Union v. Dharam Dhoda and Others [(2003) 11 SCC 1]*** wherein it was held that 'wilful' in Section 2 of the Contempt of Courts Act, 1971 means an act or omission done voluntarily and intentionally with the specific intent to do something the law forbids or with an intent to omit to do something that the law requires to be done. The Respondent stated that in view of the CIRP being initiated, the lack of payment is not wilful, voluntary or intentional.

Observations of the DHC

The DHC, while weighing the arguments made by the parties referred to the judgement of the Supreme Court in the case of ***B.K. Kar v. High Court of Orissa [AIR 1961 SC 1367]*** wherein it was held that mere unintentional disobedience is not enough to hold anyone guilty of contempt. Although disobedience might have been established, absence of wilful disobedience on the part of the contemnor will not hold him guilty unless the contempt involves a degree of fault or misconduct. It was further held that the Respondent was justified in not giving preferential treatment to the Petitioner towards satisfaction of the compromise decree, and that the principal of lifting of corporate veil is not applicable. The DHC also held that the criminal proceedings can continue despite of moratorium granted under the IBC.

Decision of the DHC

The DHC stated that the Respondent is not guilty of contempt of court as the Company had not wilfully disobeyed the compromise decree. However, it was further clarified that if in the future the Company is revived or any fresh cause of action arises in favour of the Petitioner, the judgment rendered by the DHC will not come in the way of the Petitioner seeking a remedy available to him in law.

VA View

This judgement clarifies a pertinent question of law that the imposition of moratorium and commencement of CIRP shall override previous payment obligations including compromise decrees, and that on institution of the CIRP under the IBC, a corporate debtor is justified in not giving preferential treatment to a party towards satisfaction of a previous payment obligation, such as a compromise decree.

This judgement follows other judgements that have been passed recently where the primacy of the IBC over other legislations have been upheld. More importantly, this judgement recognizes the provisions and functioning of the IBC in holding that once a company is under the provisions of the CIRP, the promoter and the board of directors do not have any control over the operations of the company.

III. NCLAT: A financial creditor cannot intervene or oppose admission of a corporate insolvency resolution process by another financial creditor

In the recent judgement of ***L&T Infrastructure Finance Company Private Limited v. Gwalior Bypass Project Limited and Others*** *(decided on August 19, 2019),* the National Company Law Appellate Tribunal (**"NCLAT"**) has reaffirmed the two orders passed by the National Company Law Tribunal (**"NCLT"**) dated May 29, 2019 and has held that a financial creditor cannot intervene or oppose an admission of application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**).

Facts

Gwalior Bypass Project Limited (**"Corporate Debtor"**), a special purpose vehicle was to construct, develop, finance and operate the Gwalior Bypass on NH-75 in Madhya Pradesh. As per the regulations of the National Highway Authority of India (**"NHAI"**), a project for the interest of the public is to receive a ring-fenced financing in order to protect the special purpose vehicles assets from being encumbered. Therefore, in the concession agreement executed between NHAI and the Corporate Debtor (**"Agreement"**), the Corporate Debtor was barred from creating any encumbrance, lien, rights or benefits on any of its assets, unless the NHAI had consented to the same. The Corporate Debtor issued to L&T Infrastructure Finance Company Limited (**"Appellant"**) pursuant to its sanction letter, secured, rated, redeemable, non-convertible debentures aggregating to INR 260 crores. Thereafter, a modified sanction letter was executed wherein the Appellant subscribed to non-convertible debentures aggregating to INR 241.55 crores. It is pertinent to note that the NHAI had issued no objection letters for both the sanction letters. Further, a debenture trust deed (**"Deed"**) was executed between the Corporate Debtor and IL&FS (**"Trustees"**).

During such period, ICICI Bank had also sanctioned a loan of INR 91.5 crore to the Corporate Debtor. On the default of the Corporate Debtor to repay the principal amount along with the interest to ICICI Bank, an application was filed

by ICICI Bank to NCLT for the admission of the corporate insolvency resolution process (**"CIRP"**). The NCLT admitted the same on May 29, 2019.

The Appellant therefore filed an application for intervention/impleadment before the NCLT. However, the NCLT dismissed the case. Thereafter, the matter was referred to the NCLAT.

Issue

Whether a financial creditor has the right to intervene and oppose admission of an application under Section 7 of the IBC?

Arguments

The Appellant argued that as per the Deed, the Corporate Debtor was barred from performing any acts which would either hinder or delay the payment of the debt of the Appellant. The Appellant further argued that in accordance with the Agreement, no prior approval of NHAI had been obtained by the Corporate Debtor. Moreover, the Appellant submitted that the impugned order had the effect of relegating the rights and interest of the Appellant to that of a minority financial creditor wherein its voting share has been reduced to 38.76% and that of ICICI Bank is 61.24%. The Appellant thus believes that its sole, senior and secured lender status has been disregarded. Further, the Appellant argued that by applying the provisions of the IBC, ICICI Bank had indirectly manipulated the voting share in collusion with the Corporate Debtor.

Findings of the NCLAT

NCLAT has relied on the judgement of the Hon'ble apex Court in the case of ***Innoventive Industries Limited v. ICICI Bank [(2018) 1 SCC 407]*** which held that when the default takes place, in the sense that a debt becomes due and is not paid, IBC is triggered the moment default is of INR 1 lakh or more. The Court further went on to state that within a period of 14 days, the adjudicating authority is to be satisfied that a default in the repayment of the debt has occurred. Within these 14 days, the corporate debtor shall have a right to point out that no default has occurred. Once the adjudicating authority is satisfied of the fact that a default in debt has occurred, it is to admit the application, unless the same is incomplete. The NCLAT therefore observed that an adjudicating authority is required to verify if the application is complete; if the corporate debtor is in fault for non-payment of a debt; and the amount of such a debt is INR 1 lakh or more.

Further, in accordance with the decision of NCLAT in the case of ***Innoventive Industries Limited v. ICICI Bank*** *(decided on May 15, 2017),* the Corporate Debtor may raise an application stating that there is no debt payable in law or that no default has been committed. The Corporate Debtor may also take a plea that the applicant is not a financial creditor or an operational creditor. It is therefore inferred that only a corporate debtor has the right to object to an application with regards to the CIRP and no financial creditor shall have such right to object on the application of another financial creditor.

Decision of the NCLAT

Since the Appellant is a financial creditor of the Corporate Debtor and is neither a member nor a shareholder of the Corporate Debtor, it has no right to intervene or oppose the admission of the application by ICICI Bank against the Corporate Debtor. The appeal was accordingly dismissed.

VA View

Section 7(1) of the IBC states that *"a financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government may file an application for initiating CIRP against a corporate debtor before the Adjudicating Authority when a default has occurred."* Therefore, it is provided that any financial creditor shall be allowed to file an application for CIRP when a default in the repayment of a debt has occurred. Further, in accordance with the principles of equity and natural justice and as stated in ***Sree Metalinks Limited and Another v. Union of India [(2017) 203 CompCas 442],*** NCLT may provide the corporate debtor with a reasonable opportunity to defend itself. However, no such right has been provided to a financial creditor. This judgement therefore accentuates that other than a corporate debtor, no other person, including a financial creditor shall be allowed to intervene or oppose an application for the admission of a CIRP of another financial creditor.

IV. Delhi High Court: Remedies available to allottees of flats under the Consumer Protection Act, 1986 and the Real Estate (Development and Regulation) Act, 2016, are concurrent

The Delhi High Court has, in ***M/s. M3M India Private Limited and Another v. Dr. Dinesh Sharma and Another*** *(decided on September 4, 2019),* that was clubbed together with a batch of petitions filed under Article 227 of the Constitution of India and dealing with the same question of law, held that the proceedings instituted by the buyers against the developers under the Consumer Protection Act, 1986 (**"CPA"**) can run concurrently with proceedings instituted under the Real Estate (Development and Regulation) Act, 2016 (**"RERA"**).

Facts

The common question for consideration of the Delhi High Court in this matter (and the petitions clubbed with it) was whether proceedings under the CPA can run concurrent with proceedings under the RERA.

This issue was dealt with earlier by the National Consumer Disputes Redressal Commission (**"National Commission"**) in ***Ajay Nagpal v. Today Homes and Infrastructure Private Limited*** *(decided on April 15, 2019)* where the issue involved was whether, despite the provision under Section 3 of the CPA which states that –*"the provisions thereunder shall be in addition to and not in derogation of the provisions of any other law for the time being in force",* the jurisdiction of the consumer fora stands precluded in light of RERA being enacted. In the said matter, the National Commission had held that the reliefs provided under the CPA and RERA are concurrent, and the jurisdiction of courts under the CPA is not negated by RERA. Subsequently, in several other petitions filed before the National Commission on the same issue, the forum had passed interim orders staying further proceedings on all such matters but while the same were part-heard, the Supreme Court by its order dated August

09, 2019, in ***Pioneer Urban Land and Infrastructure Limited and Another v. Union of India and Others [2019 SCC Online SC 1005]*** (**"Pioneer Judgement"**), held that reliefs given to allottees of flats/ apartments are concurrent, and such allottees are in a position to avail of reliefs under CPA, RERA, as well as under the Insolvency and Bankruptcy Code, 2016 (**"IBC"**).

Pursuant to passing of the Pioneer Judgment, the National Commission's order in ***Ajay Nagpal v. Today Homes and Infrastructure Private Limited*** has been challenged under the petitions clubbed under the above stated matter of ***M/s. M3M India Private Limited and Another v. Dr. Dinesh Sharma and Another*** before the Delhi High Court.

Arguments

The petitioners in the Pioneer judgment contended that the primary issue for consideration was the concurrent existence of the reliefs provided under IBC and RERA and not as much concurrence of the reliefs under RERA and the CPA. Hence, any observation by the Supreme Court regarding the reliefs under RERA and CPA being concurrent are to be considered as obiter dicta and not to be regarded as the ratio decidendi of the judgment, which alone has precedential value. It was further argued that the Pioneer Judgement would be applicable only to proceedings under the CPA filed prior to the enactment of RERA and not to the proceedings filed after RERA came into effect. The petitioners also argued that, even if the Pioneer Judgement is considered to hold that the CPA and RERA provide concurrent remedies, the conclusion overlooks Section 79 of RERA which states that no civil court is to have jurisdiction over matters empowered to be heard by RERA. The petitioners also contended that the conclusion recorded in the Pioneer judgment, regarding the concurrent nature of reliefs under CPA and RERA forms neither the ratio decidendi nor the obiter dicta and is, therefore, non-binding on the High Courts.

The respondents on the other hand argued that the inter-connection between proceedings under the CPA and RERA had been considered by the Supreme Court in the Pioneer Judgement and that the Supreme Court's conclusions were binding on the High Courts, even if the same was to be considered as being obiter dicta.

Observations of the Delhi High Court

The Delhi High Court referred to the judgment of the National Commission in the case of ***Ajay Nagpal v. Today Homes and Infrastructure Private Limited*** where it was held that the remedies provided by the CPA and RERA are concurrent and the jurisdictions of the forums/commissions constituted under the CPA is not ousted by RERA.

The Delhi High Court also referred to the decision of the Supreme Court in the Pioneer Judgement, wherein the Supreme Court, in examining the operation of remedies under RERA and IBC, had emphasised that the remedies under RERA were not intended to be exclusive, but were to run parallel with other remedies. As regards the concurrence of the remedies under CPA and RERA, the apex Court had observed that, *"Remedies that are given to allottees of flats/apartments are concurrent remedies, such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the IBC"* (emphasis supplied).

The Delhi High Court further observed that even in the event the afore stated observation of the Supreme Court may be characterised as obiter dicta, various judgments of the Supreme Court have held that an obiter dictum of

the Supreme Court is not only binding on the High Courts, but also has clear persuasive value before the Supreme Court itself. The Delhi High Court also observed that the reference to Section 71(1) of the RERA as an example of a parallel remedy by the Supreme Court does not, in the present context, lead to the conclusion that the Court intended to reach a decision only with regard to the pending CPA complaints, and not the ones to be instituted in the future.

Decision of the Delhi High Court

In view of the aforementioned precedents, the Delhi High Court concluded that the remedies available to the allottees of flats/apartments under CPA and RERA are concurrent and thus, there was no ground for interference with the view taken by the National Commission in the case of ***Ajay Nagpal v. Today Homes and Infrastructure Private Limited.*** The writ petitions before the Delhi High Court were thereby dismissed, and the interim orders passed by the National Commission consequently, vacated.

VA View:

The Delhi High Court's order in the instant case has clarified the position on the concurrency of remedies available under the CPA and RERA, thereby opening up multiple avenues for such allottees to seek redressal of their claims and grievances against builders under the CPA, RERA and the IBC.

This is in the interest of home buyers' as implementation of RERA is still fairly at a nascent stage in many States and curtailing remedies available to allottees of flats/apartments under CPA under such circumstances would be grossly unjust. As such, this judgement is a positive development for home buyers and will go a long way in curbing deficiency in rendering of promised products/services as well as checking malpractices by builders.

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