ANALYSIS OF CASES PERTAINING TO THE INSOLVENCY AND BANKRUPTCY CODE, 2016

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The Statement of Objects and Reasons for the Insolvency and Bankruptcy Bill, 2015, which was later passed as the Insolvency and Bankruptcy Code, 2016, provides that it has been enacted to provide insolvency resolution of corporate persons, firms and individuals in a time bound manner for maximization of the value of assets of such persons, and matters connected therewith or incidental thereto. Time is the essence of the provision. The Supreme Court in *Punjab National Bank* v. *Ajmer Singh Bhullar* [2019] 5 Comp Cas-OL 1 (SC) vacated the interim order of the High Court by which the Adjudicating Authority was directed not to pass an order as the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 was under challenge. The Supreme Court took note of the facts that the period of 270 days had ended, that as many as six resolution plans were considered and rejected and that the committee of creditors had now opined under section 30 of the Code that the matter should proceed for liquidation. It held that the proceedings had to logically culminate in a winding up of the corporate debtor.

In *Sunrise Polyfilms P. Ltd., In re* [2019] 5 Comp Cas-OL 359 (NCLT), the Adjudicating Authority did not accept the recommendation for liquidation of the company as the necessary procedure had not been followed and the decision was arrived at without inviting a resolution plan. Here the Authority took note of the fact that the object of the Code was revival of the debtor and not its liquidation.

Time is the essence

In *Dhar Textile Mills Ltd.* v. *Asset Reconstruction Co. (India) Ltd.* [2019] 5 Comp Cas-OL 141 (NCLAT) the National Company Law Appellate Tribunal observed that the Code provided a specific time frame to complete the process and the Adjudicating Authority should take it seriously and could not adjourn the matter on one or other ground. Since the matter was pending for about a year without any order either admitting

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or rejecting the petition under section 7 of the Code, the Adjudicating Authority was directed to pass appropriate order without adjourning the matter.

The practice of seeking repeated adjournments was deprecated by the Appellate Tribunal in *IDBI Bank Ltd.* v. *Odisha Slurry Pipeline Infrastructure Ltd.* [2019] 5 Comp Cas-OL 424 (NCLAT) and the Adjudicating Authority which had not passed any order on a petition filed 10 months prior thereto was directed to pass orders in terms of the decision of the Supreme Court in *Innoventive Industries Ltd.* v. *ICICI Bank* [2017] 205 Comp Cas 57 (SC). It was also clarified that there was no requirement to hear any other parties apart from the debtor and the creditor.

Though timely resolution is one of the objectives of the Code, the Supreme Court, the Appellate Tribunal and the Adjudicating Authorities have adopted a practical approach by excluding the period spent in proceedings before them while computing the period for the corporate insolvency resolution process (see *Sunrise Polyfilms P. Ltd., In re* [2019] 5 Comp Cas-OL 359 (NCLT) and *Vijay Kumar Jain* v. *Standard Chartered Bank* [2019] 5 Comp Cas-OL 531 (SC)).

Board of directors of the corporate debtor

In *Vijay Kumar Jain* v. *Standard Chartered Bank* [2019] 5 Comp Cas-OL 531 (SC), the Appellate Tribunal rejected the prayer of an erstwhile director of the corporate debtor seeking directions to the resolution professional to provide all relevant documents including the insolvency resolution plans to members of the suspended board of directors of the corporate debtor so that they may meaningfully participate in meetings held by the committee of creditors. The Supreme Court was of the view that the members of the erstwhile board of directors of the corporate debtor were vitally interested in the resolution plans that may be discussed at meetings of the committee of creditors, and that therefore copies of resolution plans must be provided as part of the documents to be furnished to the suspended board of directors of the corporate debtor even though they had no voting rights. The court observed that resolution plans are "matters to be discussed" at meetings of the committee of creditors, and the erstwhile board of directors are "participants" who will discuss these issues.

Record of financial institution

In *Macquarie Bank Ltd.* v. *Shilpi Cable Technologies Ltd.* [2018] 1 Comp Cas-OL 644 (SC), the Supreme Court was of the view that a condition precedent impossible of compliance cannot be put as a threshold

bar to the processing of an application under section 9 of the Code. It held that the requirement of a certificate from a financial institution maintaining accounts of the operational creditor was procedural and not directory in nature and the occurrence of default could be proved by means of other documentary evidence. Based on this decision the court in *Achenbach Buschhutten GmbH and Co.* v. *Arcotech Ltd.* [2019] 5 Comp Cas-OL 3 (SC) set aside the dismissal of the petition of the operational creditor on ground that a foreign bank could not give the requisite certificate.

Asset of the corporate debtor

A property handed over by the Housing and Area Development Authority to the corporate debtor for development work with no other rights accruing in its favour would not form part of the corporate debtor's assets for application of the provisions of section 14(1)(d) of the Code (*Rajendra K. Bhuta, Resolution Professional* v. *Maharashtra Housing and Area Development Authority* [2019] 5 Comp Cas-OL 12 (NCLAT)).

In *Rautomead Ltd.* v. *Shilpi Cables Technologies P. Ltd.* [2019] 5 Comp Cas-OL 98 (NCLAT) it was held that the supplier of machinery to the corporate debtor having received 90 per cent. of sale consideration was not entitled to claim possession of the machinery.

Assignment of debt

The petition by the operational creditor based on an assignment of debt was dismissed as the assignor had not signed the document of assignment. This order of the Adjudicating Authority in *Acquisory Consulting LLP* v. *BCC Infrastructure P. Ltd.* [2019] 5 Comp Cas-OL 503 (NCLT) was affirmed by the Appellate Tribunal in *Acquisory Consulting LLP* v. *BCC Infrastructure P. Ltd.* [2019] 5 Comp Cas-OL 519 (NCLAT) holding that relationship of corporate debtor and operational creditor was not established. Similarly in *Metco Tracom P. Ltd.* v. *Associated Machinery Corporation Ltd.* [2019] 5 Comp Cas-OL 16 (NCLT) the petition based on an assignment of debt was dismissed as there was no evidence to show that the sum paid to the corporate debtor by a third party was assigned to the petitioner to make it an operational creditor.

Notice of demand

Advocate whether can issue notice. The issue whether an advocate could issue a notice of demand under section 8(1) of the Code was put to rest by the Supreme Court by its decision dated December 15, 2017 in *Macquarie*

Bank Ltd. v. *Shilpi Cable Technologies Ltd.* [2018] 1 Comp Cas-OL 644 (SC) wherein it held that (page 688) : "the expression 'an operational creditor may on the occurrence of a default deliver a demand notice . . .' under section 8 of the Code must be read as including an operational creditor's authorized agent and lawyer, as has been fleshed out in forms 3 and 5 appended to the Adjudicating Authority Rules". The decisions of the Appellate Tribunal in *Uttam Galva Steels Ltd.* v. *DF Deutsche Forfait AG* [2017] 204 Comp Cas 511 (NCLAT) and *Shilpi Cable Technologies Ltd.* v. *Macquarie Bank Ltd.* [2018] 1 Comp Cas-OL 642 (NCLAT) were reversed. The Appellate Tribunal in *D. Srinivasulu* v. *Dr. Reddy's Laboratories Ltd.* [2019] 5 Comp Cas-OL 622 (NCLAT), dated October 16, 2017 following the decision in *Uttam Galva Steels Ltd.* v. *DF Deutsche Forfait AG* [2017] 204 Comp Cas 511 (NCLAT) had set aside the Adjudicating Authority's order on the ground that the advocate, in the absence of any authority of the board of directors and holding no position with or in relation to the operational creditor, could not issue any notice under section 8(1) of the Code. This decision was reversed by the Supreme Court relying on its decision in *Macquarie Bank Ltd.* v. *Shilpi Cable Technologies Ltd.* [2018] 1 Comp Cas-OL 644 (SC) (see *Dr. Reddy's Laboratories Ltd.* v. *D. Srinivasulu* [2019] 5 Comp Cas-OL 626 (SC)).

Notice at corporate office. With regard to service of notice, the Appellate Tribunal in *Alloysmin Industries* v. *Raman Casting P. Ltd.* [2019] 5 Comp Cas-OL 398 (NCLAT) held that service of notice at the corporate office instead of at the registered office of debtor was a valid service.

Section 7 application. In *Asset Advisory Services India P. Ltd.* v. *VSS Projects P. Ltd.* [2019] 5 Comp Cas-OL 687 (NCLAT), the corporate debtor had contended that the appellant was an operational creditor and not a financial creditor as claimed and was under a legal obligation to issue a notice under section 8(1) of the Code. The Adjudicating Authority despite noticing the fact that "the financial creditor extended short loan of Rs. 2.5 crores to the corporate debtor, and pursuant to that, a promissory note also was issued by the corporate debtor to repay on or before June 30, 2016 together with at 24 per cent. per annum payable in advance monthly instalments", held that "the approach of financial creditor before this honourable Tribunal is premature apart from its failure to ensure compliance of section 8(1) of the Code, since financial creditor is relying upon section 8(2)(a) of the Code". The Appellate Tribunal reversed the decision of the Adjudicating Authority holding that the requirement of issuance of notice

under section 8(1) of the Code was not applicable to a petition filed under section 7 of the Code.

Approval of shareholders

Section 10(3)(c) of the Code provides that a petition by the corporate debtor has to be approved by a special resolution passed by its shareholders or by a resolution passed by at least three-fourths of the total number of partners of the debtor as the case may be. The majority of shareholders must approve of the decision. This right of the shareholders to approve or disapprove the decision of the board of directors to initiate proceedings under section 10 of the Code cannot be curtailed in any manner.

An interesting situation arose in *Export-Import Bank of India* v. *Astonfield Solar (Gujarat) P. Ltd.* [2019] 5 Comp Cas-OL 23 (NCLAT). The "deed of pledge" entered into between the corporate debtor and the financial creditor, inter alia, provided that the voting rights of the shareholders would cease to exist upon the occurrence of an event of default. The petition filed by the corporate debtor under section 10 of the Code was challenged by the financial creditors relying on the deed of pledge and contending that the shareholders had no voting right to approve the decision of the board of directors to initiate the "corporate insolvency resolution process" in respect of the "corporate debtor". The Appellate Tribunal did not accept the contention of the financial creditors and held that "the shareholders, in terms of the 'deed of pledge' dated March 28, 2013 might lose their right to vote but they continued to be shareholders even thereafter and their right under clause (c) of sub-section (3) of section 7 did not stand superseded. The shareholders had a right to decide whether to approve or disapprove the decision to proceed with the corporate insolvency resolution process under section 10 of the Code. Such right did not stand curtailed by the deed of pledge dated March 28, 2013". The order of admission was affirmed.

In *Vandana Industries Ltd.* v. *IL & FS Financial Services Ltd.* [2019] 5 Comp Cas-OL 646 (NCLAT), the order of admission of the petition under section 10 of the Code was set aside by the Appellate Tribunal on appeal by a shareholder contending that the board of directors had failed to take prior approval of the shareholders in an extraordinary general meeting as required under the articles of association of the debtor.

Appeal by corporate debtor

The Supreme Court in *Innoventive Industries Ltd.* v. *ICICI Bank* [2017] 205 Comp Cas 57 (SC) held that once an insolvency professional is

appointed to manage the company, the erstwhile directors who are no longer in the management cannot maintain an appeal on behalf of the company. Applying this principle, the Appellate Tribunal dismissed an appeal by the corporate debtor against the order of admission of petition under section 7 of the Code. The Tribunal had given time for substitution of the debtor with one of its shareholders which was not done (*Radius Infratel P. Ltd.* v. *Union Bank of India* [2019] 5 Comp Cas-OL 102 (NCLAT)).

Corporate guarantor

The corporate debtor who gave guarantee on behalf of the principal borrower for the items referred to in clause (a) of sub-section (8) of section 5 of the Code, would also come within the meaning of "corporate debtor" qua the "financial creditor" in whose favour the guarantee had been given (*Ajay Chaturvedi* v. *JM Financial Asset Reconstruction Co. Ltd.* [2019] 5 Comp Cas-OL 109 (NCLAT)).

Where the loan agreement and corporate guarantee were suspended by a foreign court on a finding that no debt was due and payable by the principal borrower, the Appellate Tribunal in *Export Import Bank of India* v. *CHL Ltd.* [2019] 5 Comp Cas-OL 387 (NCLAT) affirmed the view of the Adjudicating Authority that proceedings under 2016 Code cannot be invoked against the corporate guarantor.

Financial creditor

A bank that has given a guarantee for the corporate debtor is covered under the definition of "financial creditor" as the corporate debtor has a counter-indemnity obligation in respect of the guarantee. The bank as a financial creditor was allowed to be part of the committee of creditors in *Andhra Bank* v. *F. M. Hammerle Textile Ltd.* [2019] 5 Comp Cas-OL 450 (NCLAT).

Holders of foreign currency convertible bonds were considered financial creditors and permitted to be part of the committee of creditors by the Adjudicating Authority in *Merrill Lynch International* v. *Aishwarya Mohan Gahrana, Interim Resolution Professional* [2019] 5 Comp Cas-OL 473 (NCLT).

The Appellate Tribunal in *Neeraj Bhatia* v. *Davinder Ahluwalia* [2019] 5 Comp Cas-OL 574 (NCLAT) was of the opinion that a personal guarantor cannot claim to be a "financial creditor" as defined under section 5(7) read

with sub-section (8) of the Code till it was shown that the debt amount had been disbursed against consideration for time value of money.

Operational creditor

The admission of a petition filed under section 9 of the Code by the ex-employee for outstanding salary was affirmed by the Appellate Tribunal in *Anil Nanda* v. *Hari Kishan Sharma* [2019] 5 Comp Cas-OL 123 (NCLAT). A chartered accountant who provided professional services to the corporate debtor was included in the definition of operational creditor (*Sanjaya Kumar Ruia* v. *Magna Opus Hospitality P. Ltd.* [2019] 5 Comp Cas-OL 154 (NCLT)).

Resolution plan

In a recent decision dated February 5, 2019 (*K. Sashidhar* v. *Indian Overseas Bank* [2019] 213 Comp Cas 356 (SC)) the Supreme Court held that the scope of scrutiny of the resolution plan by the National Company Law Tribunal and the National Company Law Appellate Tribunal was limited to testing validity of the resolution plan as "approved" by the committee of creditors. The resolution plan approved by the committee of creditors when found to be discriminatory was not approved by the Adjudicating Authority and the committee of creditors were directed to consider other plans. This decision was affirmed by the Appellate Tribunal in *Binani Industries Ltd.* v. *Bank of Baroda* [2019] 5 Comp Cas-OL 28 (NCLAT).

In its judgment dated February 5, 2019 (*K. Sashidhar* v. *Indian Overseas Bank* [2019] 213 Comp Cas 356 (SC)) the Supreme Court also held that substitution of the word "seventy-five" with "sixty-six" in section 30(4) of the Code with effect from June 6, 2018 was not retrospective in operation. The Appellate Tribunal in *SICOM Ltd.* v. *Alok Employees Benefit and Welfare Trust* [2019] 5 Comp Cas-OL 93 (NCLAT) has held that the amendment to the effect that approval of the plan could be by a vote of sixty six per cent. of voting share of financial creditors instead of seventy five per cent. applies to plans not approved prior to the amendment.

Powers of Adjudicating Authority

A petition based on an unenforceable decree passed by a U. S. court was dismissed by the Adjudicating Authority in *Usha Holdings LLC* v. *Francorp Advisors P. Ltd.* [2019] 5 Comp Cas-OL 159 (NCLT). The Appellate Tribunal affirmed the decision and held that the Adjudicating Authority not being a court or Tribunal and the insolvency resolution process not being a litigation, it had no jurisdiction to decide whether a foreign decree

was legal or illegal (*Usha Holdings LLC* v. *Francorp Advisors P. Ltd.* [2019] 5 Comp Cas-OL 174 (NCLAT)).

The Adjudicating Authority cannot, exercising inherent powers, decide any dispute in a proceeding under section 7 though it may notice pre-existence of dispute while dealing with the application under section 9 of the Insolvency and Bankruptcy Code, 2016 (*Neha Himatsingka* v. *Himatsingka Resorts P. Ltd.* [2019] 5 Comp Cas-OL 253 (NCLAT)).

Priority of debt

The High Court in *Leo Edibles and Fats Ltd.* v. *Tax Recovery Officer* [2019] 5 Comp Cas-OL 691 (T&AP) held that the Tax Recovery Officer under the Income-tax Act, 1961 could not claim any priority merely because of the fact that the order of attachment issued by him was prior to the initiation of liquidation proceedings under the Code against the company and that even if the order of attachment constituted an encumbrance on the property, it still did not have the effect of taking it out of the purview of section 36(3)(b) of the Code. The court was of the view that the order of attachment therefore could not be taken to be a bar for completion of the sale effected by the liquidator under the provisions of the Code and that the Income-tax Department necessarily had to submit its claim to the liquidator for consideration as and when the distribution of the assets, in terms of section 53(1) of the Code, was taken up.

Moratorium

Once the moratorium in terms of section 14 of the Code was in force the financial creditor including the bank has to prefer its claim before the resolution professional, which would be considered along with other claims as per law. The bank debited a large number of entries from the account of the corporate debtor which resulted in converting the account to a non-performing asset during the moratorium period. The Adjudicating Authority directed the bank to roll back all the debit entries and also imposed cost (*Nitin Khandel Wal* v. *Maini Construction Equipments P. Ltd.* [2019] 5 Comp Cas-OL 149 (NCLT)).

In *Monnet Ispat and Energy Ltd.* v. *Government of India, Ministry of Coal* [2019] 5 Comp Cas-OL 281 (NCLAT), the mines allocated under the coal mines development and production agreement and vesting order on the corporate debtor was terminated by the Government for failure by the corporate debtor to fulfil conditions after the commencement of the insolvency resolution process. Since possession of the coal mine was not handed over to the debtor and as the Government had issued the show-cause notice prior to commencement of the insolvency resolution process,

the cancellation of the agreement and the order by the Government was found not to be in violation of section 14(1)(d) of the Code.

Performance guarantees furnished by banks would not enjoy the benefit of moratorium as envisaged under section 14 of the Code and therefore, guarantees were held to be rightly invoked in *Levcon Valves P. Ltd.* v. *Energo Engineering Projects Ltd.* [2019] 5 Comp Cas-OL 330 (NCLT).

The Adjudicating Authority in *Super Multicolor Printers P. Ltd.* v. *Senior Executive Engineer, Himachal Pradesh Electricity Board* [2019] 5 Comp Cas-OL 349 (NCLT) dealing with issue of supply of electricity as an essential service held that the electricity for the production process being used as direct input for output supplied was not an essential service. The resolution professional was directed to obtain separate meters and pay dues pertaining to charges used in the production process from the sale proceeds. It was also held that section 14(1) of the Code prohibited execution of a decree against the corporate debtor. Therefore, recovery should not have been made by the bank by tagging 5 per cent. of the amount being deposited on behalf of the corporate debtor in the transaction recovery account with effect from the date of commencement of the resolution process.

Stressed assets in electricity sector

The Reserve Bank of India in exercise of the powers under sections 35A, 35AA (read with S. O. 1435(E), dated May 5, 2017[1] issued by the Government of India) and section 35AB of the Banking Regulation Act, 1949 and section 45L of the Reserve Bank of India Act, 1934, issued a circular on February 12, 2018 which was brought into force from March 1, 2018. The circular mandatorily directed banking companies to initiate the insolvency resolution process of stressed assets under the provisions of the Code. The petitioners, associations of power producers, filed writ petitions, inter alia, challenging Circular No. DBR No. BP. BC. 101/21.04.048/2017-18, dated February 12, 2018 contending that it was arbitrary and violative of article 14 of the Constitution of India as it equated a heavily regulated sector like electricity, where the Central and State Regulatory Commissions regulate the tariff, procurement, payments, etc., with unregulated sectors like steel, cement, manufacturing, etc., and thereby treated unequals equally, that there was a need for a separate framework which recognised and addressed the externalities faced by the power sector. The Allahabad High Court in *Independent Power Producers Association of India* v. *Union of India* [2019] 5 Comp Cas-OL 711 (All) was of the view that the Central

1. See [2017] 202 Comp Cas (St.) 46.

Government should consider initiation of a consultative process and conclude it within 15 days. It also stated that a High Level Empowered Committee was to be formed and a senior representative of the Reserve Bank of India should be invited as member of the committee with a direction that the committee must submit its report within two months from the date of its constitution. It held that the rights or powers of a financial creditor under section 7 of the Code or even of the Reserve Bank of India in issuing directions in specific cases under section 35AA of the 1949 Act were not curtailed. No interim relief was granted but the petitioners' associations were given liberty to apply for urgent interim relief if the need so arose, placing requisite factual details on record.

End of Volume 5