Lakshmikumaran & Sridharan attorneys

corporate

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

September 2018 / Issue–84

Contents

September
2018

Articles

Section 29A of IBC: Impact and Recent Developments

By **Surbhi Jaju**

The Insolvency and Bankruptcy Code 2016 ('Code') aims for resolution of insolvency as opposed to liquidation. The law was framed with the intention to expedite and simplify the process of insolvency and bankruptcy proceedings in India ensuring fair negotiations between opposite parties and encouraging revival of the company by formulation of a resolution plan.

A resolution applicant[1] as originally defined under the Code meant any person who submits a resolution plan[2] to the resolution professional[3]. Thus, a resolution applicant could be any person i.e. creditor, promoter, prospective investor etc. and there was no specific criteria or qualification assigned to who could submit a resolution plan. This lacuna in the law gave an opportunity of backdoor entry to defaulting promoters to submit a resolution plan and acquire assets of the corporate debtor at significantly discounted prices.

Insolvency and Bankruptcy Code (Amendment) Bill 2017

To reduce the chances of likely default brought forth by the abovementioned loophole, Section 29A was added to the Code by the 'Ordinance of 2017'[4]. The 'Ordinance of 2017' was replaced by The Insolvency and Bankruptcy Code (Amendment) Bill, 2017 ('IBC 2017') that gave effect to the amendments introduced in the ordinance with a few changes.

As a consequence of inclusion of section 29A in the Code, persons who have contributed to the defaults of the corporate debtor or are undesirable due to incapacities as specified in the section or are a '*related party*' to another defaulting party, are prevented from gaining control of the corporate debtor by being declared ineligible to submit a resolution plan under the Code. This provision asserts protection to the creditors of the company by safeguarding them against unscrupulous persons who irrespective of their earlier defaults are trying to reward themselves by undermining the whole objective of the Code and do not aim to contribute to the revival of the corporate debtor.

While the insertion of Section 29A cured a few gaps in the law under the Code, the insolvency resolution procedure had become complicated as the resolution professional or liquidator had been accorded with an additional responsibility of inspecting the eligibility of resolution applicants putting a strain on the 180-day deadline for completion of the corporate insolvency resolution process.

For instance, during the discussions pertaining to the insolvency of *MBL Infrastructure Limited,* the committee of creditors unanimously believed that the non-defaulting promoters of the corporate debtor were barred under section 29A from submitting a resolution plan. On the other hand, the resolution professional was of the

[1] Section 5(25), Insolvency and Bankruptcy Code 2016.
[2] Section 5(26), Insolvency and Bankruptcy Code 2016.
[3] Section 5(27), Insolvency and Bankruptcy Code 2016.
[4] The Insolvency and Bankruptcy Code (Amendment) Ordinance 2017.

opinion that they did not fall under the criteria of ineligibility specified under section 29A as they were not defaulters. This led to a lot of confusion and delay and the insolvency process only resumed after the National Company Law Tribunal ('NCLT') clarified that the promoters were allowed to submit a resolution plan.[5]

Further, the ambit of ineligibility was very wide declaring disqualification of many people due to lack of definition of the term 'related to' under the Code. The scope of the term 'connected person'[6] defined in the explanation of the section was also very extensive. As a result of the wide scope of ineligibility, many genuine resolution applicants were barred from submitting a resolution plan.

Another contention raised in a plethora of cases at the NCLT was whether section 29A will be applicable prospectively or retrospectively as the same was left unanswered in IBC 2017. This was settled by the NCLT in the insolvency matter of *Wig Associates Private Limited*[7] ('*Wig Associates*').

In this case, an application of insolvency was filed by Wig Associates as a corporate debtor[8] under the Code. A resolution plan was submitted by the relative of the director of Wig Associates. NCLT adjudged that the resolution applicant i.e. the relative of the director should be allowed even though he falls under the criteria of ineligibility under Section 29A being a related party to a defaulter under clause (i) of section 29A. NCLT held that since section 29A alters existing substantive and legal rights, it should be applied prospectively. This meant that all resolution plans that were submitted before the ordinance of 2017 was introduced i.e. November 23,2017 will be considered by the committee of creditors to be undertaken for the revival of the company and the resolution applicants who had submitted the resolution plans would not fall under the purview of ineligibility prescribed under section 29A.

IBC 2017 had been highly criticized and required necessary changes and clarifications specifically pertaining to section 29A. In view of this, Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 was introduced which was replaced by the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2018 ('IBC 2018').

Insolvency and Bankruptcy Code (Second Amendment) Bill 2018

IBC 2018 has modified the eligibility criteria and clarified the extent and applicability of the law under Section 29A. The exemptions that could be resorted to by resolution applicants to escape ineligibility are reduced and limited under IBC 2018 and the ambit of section 29A has become wider with the term 'related party'[9] being defined under the Code. The definition of 'related party' in relation to an individual is extensive bringing a large number of people in the ineligibility criteria. Moreover, in determining the connected persons of an individual where he/she is married, the relatives of the spouse of the individual will also be included in the scope of the term 'connected persons' for the purpose of section 29A.

[5] *RBL Bank Ltd* v. *MBL Infrastructure Ltd* [CA [IB] No.543/KB/2017; order dated December 18, 2017].
[6] Explanation to clause (j) of Section 29A.
[7] *Wig Associates Private Limited* [C.P.NO.1214/I&BC/NCLT/MB/MAH/2017]
[8] Section 10, Insolvency and Bankruptcy Code, 2016.
[9] Section 5 (24A), Insolvency and Bankruptcy Code, 2016.

Additionally, IBC 2018 has excluded 'financial entity'[10] from the purview of 'related party' in the Code. It also provides for limited exemptions to the micro, small and medium sector enterprises ('**MSMEs**') from the application of section 29A and allows its promoters to submit a resolution plan provided he is not a wilful defaulter[11] as concerns with respect to third party interest in submitting a resolution plan for the MSMEs was recognized.

The insolvency proceedings of *Ruchi Soya Industries Ltd.* is a noteworthy example showcasing the wide ambit of ineligibility that could be used by other bidders to challenge the eligibility of the resolution applicants. In this case, the committee of creditors declared Adani Wilmar as the highest bidder and a resolution plan was being finalised. Meanwhile, a claim of ineligibility was raised by Patanjali Ayurved, the second highest bidder against Adani Wilmar contesting its eligibility under Section 29A of the Code. The peculiarity of this case is that Adani Wilmar is claimed to be ineligible because the spouse of the managing director of Adani Wilmar is the daughter of a defaulting promoter. Patanjali Ayurved has approached NCLT challenging the decision of the committee of creditors approving the bid of Adani Wilmar. NCLT is yet to decide on the case[12].

Further, the Supreme Court in the case of *Chitra Sharma and Ors. v. Union of India and Ors*[13] and other connected matters i.e. the Jaypee Infratech Case/Homebuyers case[14] has clarified and put an end to the questions raised with respect to application and scope of section 29A. While dealing with the eligibility of Jaiprakash Associates Limited ('JAL'), the parent company of Jaypee Infratech Limited as a resolution applicant under section 29A, the Supreme Court has observed that JAL and other promoters are disqualified from submitting a resolution plan as they fall within the scope of the section 29A and therefore are ineligible. It has described insertion of section 29A as a 'plugging loophole' and has ruled that strict adherence to Section 29A is mandatory and that wilful defaulters shall not be permitted to participate in the corporate insolvency resolution process.

Conclusion

It is important to note that section 29A laid down a multiple layered and comprehensive standard of disqualification that will exclude *bona fide* resolution applicants. The application of the section might also disbar crucial stakeholders to bid for the revival of the company. Therefore, certain amount of leniency by the courts in deciding the issue of disqualification is the need of the hour to maximise the objectives of the Code.

[The author is an Associate in Corporate law practice, Lakshmikumaran & Sridharan, Mumbai]

[10] Explanation II to Section 29A, Insolvency and Bankruptcy Code 2016.
[11] Section 240A, Insolvency and Bankruptcy Code, 2016.
[12] https://economictimes.indiatimes.com/news/economy/policy/patanjali-moves-nclt-against-ruchi-soya-lenders-approving-adani-wilmar-bid/articleshow/65532423.cms
[13] W.P. (C) 744 of 2017.
[14] Judgment dated August 09, 2018 by Bench comprising of Hon'ble Mr .Chief Justice of India Dipak Misra, Hon'ble Mr. Justice D.Y. Chandrachud and Hon'ble Mr. Justice A.M. Khanwilkar in W.P.(C) 744 of 2017.

Pendency of objections to an arbitral award amounts to a dispute for the purposes of section 9 of IBC

By **Ankit Parhar**

Recently, in *K. Kishan v. Vijay Nirman Company Pvt. Ltd.*[15] the Supreme Court had an occasion to decide whether the provisions of the Insolvency and Bankruptcy Code, 2016 ('IBC') can be invoked in respect of an Operational Debt where an Arbitral Award has been passed in favour of the Operational Creditor in respect of such Operational Debt, but, the objections against the said Arbitral Award are pending under Section 34 of the Arbitration & Conciliation Act, 1996 ('A&C Act').

The facts before the Supreme Court were that VNCP had entered into a sub-contract with KCPL on 01-02-2008, to undertake 50% of Section 2 work of 'Construction and widening of the existing two lane highway to four lanes on NH 67 at KM 190000 to KM 218215 admeasuring a total of 28.215 KM for and on behalf of KCPL.' Apart from this Agreement, a separate agreement of the same date was entered into between the KPCL and one SDM Projects as a result of which, a tripartite Memorandum of Understanding was entered into on 09-05-2008 between KCPL, SDM Projects and VNCP.

During the course of the project, certain disputes arose between the parties. The said disputes were referred to arbitration. The Arbitral Tribunal delivered an Award dated 21.01.2017. The Arbitral Tribunal allowed one of the claims of VNCP for a sum of Rs. 1,71,98,302/- and another claim for a sum of Rs. 13,56,98,624/-. Three cross claims that were made by KCPL were rejected.

Thereafter, a notice under Section 8 of the IBC dated 06.02.2017 was sent by VNCP to KCPL to pay an amount of Rs. 1,79,00,166/-. KCPL responded on 16.02.2017 and disputed the invoice that was referred to in the said notice, stating that the said amount was, in fact, the subject-matter of an arbitration proceeding, and as per KCPL's accounts, VNCP was liable to pay larger amounts to them which were claimed in counter-claims before the Arbitral Tribunal. Subsequently, KCPL filed its objections under Section 34 of the A&C Act challenging the Arbitral Award.

After the filing of the objections by KCPL, VNCP filed a petition under Section 9 of the IBC on 14.07.2017 before the NCLT. In the said petition, VNCP stated that as the amount claimed by it formed part of the Award, it has become an Operational Debt. On the other hand, KCPL submitted that the alleged Operational Debt was disputed all along and that it has also raised its counter-claims for much higher sums. It was also stated that KCPL has filed its objections against the Award under Section 34 of the A&C Act, which were pending and if its objections were allowed and its counter claims were awarded, KCPL would have to make recoveries from VNCP and not the other way around.

The NCLT, by its order dated 29.08.2017, held that as the counsel for the KCPL was fair enough to admit that VNCP is entitled to the said sum of Rs. 1,71,98,302/-. According to the NCLT, the fact that a Section 34 petition was pending was irrelevant for the reason that the claim stood admitted, and there was no stay of the Award. For these reasons, the Section 9 petition was admitted by the NCLT.

Being aggrieved, KCPL filed an appeal before the NCLAT. The NCLAT held that the non-obstante clause contained in Section 238 of the

[15] Civil Appeal No. 21824 of 2017 decided on 14.08.2018

IBC would override the A&C Act. The NCLAT also held that since Form V of Part 5 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 requires the particulars of an order of an arbitral panel adjudicating on the default, this would have to be treated as "a record of an operational debt", as a result of which the petition would have to be admitted. Accordingly, the appeal by KCPL was dismissed.

KCPL came in appeal before the Supreme Court. The parties made various submissions before the Supreme Court. Ultimately, the Supreme Court followed its decision in *Mobilox Innovations Private Limited v. Kirusa Software Private Limited*[16] and held that the mere factum of challenge of an Arbitral Award under Section 34 of the A&C Act would be sufficient to state that the Corporate Debtor disputes the Award and that such a case would be treated as a case of a pre-existing ongoing dispute.

As far as the non-obstante clause contained in Section 238 of the IBC is concerned, the Supreme Court observed that Section 238 of the IBC would apply in case there is an inconsistency between the IBC and the A&C Act. However, the Supreme Court held that there was no such inconsistency demonstrated in the present case.

Therefore, the Supreme Court held that the pendency of objections under Section 34 or of an appeal under Section 37 of the A&C Act will render the subject matter of the award as a 'disputed debt' for the purposes of the IBC and an Operational Creditor cannot invoke the provisions of the IBC to initiate the Corporate Insolvency Resolution Process against a Corporate Debtor.

The facts in *Mobilox* were that Mobilox was engaged by Star TV for conducting the televoting for one of its reality shows. Mobilox, in turn, sub-contracted the work to Kirusa. Kirusa provided the requisite services and raised monthly invoices. Mobilox and Kirusa also entered into a non-disclosure agreement (NDA). Mobilox withheld payments of the invoices on the ground that Kirusa had breached the NDA by disclosing the fact that it had worked for the said reality show run by Star TV on its website. Various letters and notices were exchanged between the parties. Ultimately, Kirusa filed a petition under the IBC against Mobilox for non-payment of its Operational Debt.

The NCLT dismissed the petition filed by Kirusa on the ground that Mobilox had issued a notice of dispute and the petition was hit by Section 9(5)(II)(d) of the IBC. Kirusa filed an appeal before the NCLAT. The NCLAT held that the defence raised by Mobilox was vague and motivated to evade the liability and allowed the appeal.

Mobilox filed an appeal before the Supreme Court. The Supreme Court held that in cases of an Operational Debt, what is important is that the existence of the dispute or the suit or arbitration proceedings in respect thereof must exist before the receipt of the demand notice. The Supreme Court held that the NCLT has to examine whether:

(i) There is an Operational Debt as defined under the IBC?

(ii) The documentary evidence shows that the Operational Debt is due and payable?

(iii) There is existence of a dispute between the parties or the record of the pendency of a suit / arbitration filed before the receipt of the demand notice?

The Supreme Court held that in case any one of the said conditions is lacking, the application would have to be rejected. The Supreme Court also held that the word "and"

[16] (2018) 1 SCC 353

occurring in Section 8(2)(a) of the IBC must be read as "or" as an anomalous situation would arise as disputes would only stave off the bankruptcy process if they are already pending in a suit / arbitration and not otherwise.

In this background, the Supreme Court had held that once the Operational Creditor has filed an application, which is otherwise complete, the NCLT must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or if there is a record of dispute in the information utility. The Supreme Court had further held that such notice of dispute must bring to the notice of the Operational Creditor the existence of a dispute '*or*' the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties.

The Supreme Court had also held that all that the NCLT is to see at the stage of admission is whether there is a plausible contention which requires further investigation and that the dispute is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It was also held that at the stage of admission, the NCLT does not need to be satisfied that the defence is likely to succeed. The Supreme Court went on to hold that "So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

The Supreme Court also took note that the original definition of a "dispute" as provided in the bill, which ultimately became the code, has now become more inclusive as the word "bona fide" appearing before "suit or arbitration proceedings" in Section 8 of the IBC has been deleted. Consequently, all disputes (not necessarily bona fide disputes) will also be considered as "dispute" to deny an Operational creditor the right to invoke the jurisdiction of NCLT under the IBC.

Though the judgments in *K. Kishan* and *Mobilox* bring some clarity on the meaning of a 'dispute' in respect of the Operational Debt, the concept still remains rather subjective and it will have to be determined in the facts of each case whether the dispute truly exists in fact and is not spurious, hypothetical or illusory.

[The author is a Joint Partner, in Commercial Dispute Resolution practice, Lakshmikumaran & Sridharan, New Delhi]

Notifications and Circulars

Streamlining the process of public issue: Amendments have been made in the SEBI (Issue and Listing of Debt Securities) Regulations, 2008, SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013, SEBI (Public Offer and Listing of Securitised Debt Instruments) Regulations, 2008 and SEBI (Issue and Listing of Debt Securities by Municipalities) Regulations, 2015 to ensure that the process of issue of debt securities becomes more simplified for both the body corporate issuing the securities and the investor(s). It becomes applicable from October 1, 2018 and covers public issues of debt securities, non-convertible preference shares and securitized debt instruments.

The process of submitting the application form has also been modified and it ensures that there are less chances of any unscrupulous transactions, and it is mirrored with the obligation on part of the party receiving the application or

the payment to provide a counterfoil receipt to the investor. In case a self-certified syndicate bank handles such transactions, they must ensure that the information is uploaded in the electronic bidding system as provided for by stock exchange(s) and the specified amount is only blocked. The concerned stock exchange also has to validate such electronic bid details and may request for re-submission based on the information not provided correctly.

Role of Sub-Broker vis-a-vis Authorized Person: SEBI has removed sub-brokers as a category of market intermediaries. As noted by the regulator themselves, there was no practical need to have two separate classes of intermediaries, i.e. sub-broker and authorized persons since both fulfil the same role.

It has provided that no new registrations for sub-brokers would be entertained by the regulator and for persons already registered, a deadline of March 31, 2019 has been accorded to such persons to change into either authorized persons or trading members. In case they fail to make the shift, such persons would be considered to have surrendered their registration from the effective date.

For those persons who had applied to be sub-brokers, the regulator provided that such application amount would be refunded. Similarly, for the existing sub-brokers who had paid for the fees for years beyond 2018-2019, such renewal fees would be refunded based on the recommendations received from the relevant Stock Exchange(s).

Extension of Trading hours of Securities Lending and Borrowing Segment: SEBI in the month of May already extended the trading hours of equity derivatives, operational from October 1, 2018, which used to close at 3:30 pm, to 11:55 pm so as to bring parity between commodity trading and equity trading. In line with the same, SEBI has extended the trading hours for the SLB segment, but only till 5 pm.

SLB introduced in April is only available for shares trading in the derivative segment and is the process of physical settlement of equity derivative contract wherein shares are exchanged instead of cash.

Draft Companies (Cost Records and Audit) Amendment Rules, 2018: The Central Government has proposed to introduce the Companies (Cost Records and Audit) Amendment Rules of 2018 to amend the Companies (Cost Records and Audit) Rules, 2014. The draft rules expressly provide that those companies who had already filed their cost audit report in form CRA-4 for the financial year 2017-2018 with the Central Government prior to issue of these rules such companies are not required to file their cost audit report for the said financial year once again.

The draft rules classify overheads according to functions, viz., works, administration, selling and distribution, head office, corporate etc. and define each category. The rules also elaborate upon preparation of 'Cost Statements' providing that cost statements (monthly, quarterly and annually) showing quantitative information in respect of each goods or service under reference shall be prepared showing details of available capacity, actual production, production as per excise records, production as per GST records, capacity utilization (in-house), stock purchased for trading, stock and other adjustments, quantity available for sale, wastage and actual sale, total quantity of outward supplies as per cost records and total outward supplies as per GST records during current financial year and previous year.

Solar rooftop projects facing hurdles: India is the world's third-largest energy consumer after the US and China. India is running the world's largest clean energy programme as part of its

global climate change commitments. Under the clean energy program, India aims to achieve clean energy capacity of 175 GW by 2022. Out of this, India plans to add 100 GW of solar capacity by 2022 including 40 GW from rooftop projects. As against the target of adding 1,000 MW from rooftop projects in 2017-18, India managed only 500 MW.

Recently, Ministry of Finance imposed a safeguard duty of 25% on solar panels imported into India on the recommendation of the Directorate General of Trade Remedies. The levy was opposed by the renewable energy industry and petitions challenging the levy are pending before the Orissa High Court. The High Court has granted a conditional stay on the levy. In view of the orders of the High Court, the Ministry of Finance subsequently announced that the government will not insist on the payment of safeguard duty for the time being, but, imported solar cells and modules will be assessed provisionally on furnishing a letter of undertaking or bond.

Now, the recent proposals of the Maharashtra State Electricity Distribution Company Limited (MSEDCL) are being seen as factors that will discourage prosumers, i.e. producers who also consume, from investing in solar rooftop projects and hinder the achievement of the already ambitious targets. Last month, MSEDCL had proposed the levy of a surcharge of Rs. 1.26/- per unit on solar rooftop prosumers. Presumably, the surcharge was necessitated due to a large number of consumers switching over to solar power.

Now, MSEDCL has proposed to replace the present system of 'net metering' for solar rooftop prosumers with a system of 'gross metering'. Under the present system of net metering, if a prosumer uses 500 units supplied by MSEDCL and generates 450 units from its rooftop panels, the prosumer will only be billed for 50 units at the prevailing MSEDCL tariff. However, under the proposed gross metering system, the same prosumer will be billed for all 500 units supplied by MSEDCL at the prevailing MSEDCL tariff and MSEDCL will buy the 450 units generated by the prosumer at the average cost of renewable energy purchased by MSEDCL.

The decisions with regard to the levy of the proposed surcharge and the introduction of the gross metering system are presently pending before the Maharashtra Electricity Regulatory Commission (MERC).

Ratio Decidendi

Direction for constitution of a fresh Committee of Creditors justified as home buyers in real estate projects come within the purview of 'financial creditors'

Key Point:

In view of that fact home buyers in real estate projects have now been instilled within the definition of 'financial creditors', it is warranted to direct fresh constitution of Committee of Creditors ("CoC") in accordance with the provisions of the law.

Brief Facts:

A writ was filed under Article 32 of the Constitution of India for protection of the interests of home buyers in projects floated by Jaypee Infratech Limited ("JIL"), a special purpose vehicle created by its holding company Jaiprakash Associates Limited ("JAL"), to the

order dated August 9, 2017 ("Order") of the National Company Law Tribunal at its Bench at Allahabad ("NCLT"), initiating the Corporate Insolvency Resolution Process ("CIRP") and asserting that home buyers could not be treated at par with financial and operational creditors.

Home buyers had invested in high-tech residential projects of JIL and JAL. However, these townships failed to be ready for possession within a period of thirty-six months. The Supreme Court ("the Court") granted the Insolvency Resolution Professional ("IRP") to file an action plan before the Court vide order dated October 23, 2017. The Court also directed JAL to deposit various sums of money through its orders.

Thereafter, home buyers were directed to approach the *amicus curiae,* who was to open a web portal with the details of all home buyers. Consequently, 8% of the home buyers desire a refund of the amount invested and the remaining 92% want possession of the flats.

Afterwards, applications were invited for the submission of resolution plans, considering the interest of the home buyers. JAL had also furnished its resolution plan which was rejected due to the statutory bar contained in section 29A of the Insolvency and Bankruptcy Code ("**IBC**"). Hence, no resolution plan was approved by the CoC. However, liquidation proceedings were not begun in order to safeguard the interests of the home buyers.

Observations:

1. Whether when home buyers in real estate projects are now brought within the definition of 'financial creditors', it is justified to direct fresh constitution of CoC in accordance with the provisions of the Laws?
2. Whether preferential disbursement will also not be in the overall interest of a composite plan being formulated under the provisions of the IBC?

Held:

The original enactment of IBC did not comprise of adequate recognition of interests of home buyers and unswervingly impacted them. However, these concerns have been assuaged by the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, which has brought these home buyers within the meaning of 'financial creditors' under IBC. Further, amounts raised from allottees under real estate projects are deemed to amounts having a commercial effect of a borrowing and included within the purview of a 'financial debt'. Thus, the outstanding amount to allottees is statutorily regarded as a financial debt.

Further, the home buyers who seek refund, have sought for the issuance of interim orders for the facilitation of pro-rata disbursement of the amount deposited by JAL. However, the Court acceded to it as directing disbursement of the amount such home buyers would be palpably improper thereby causing injustice to the secured creditors, since this would amount to preferential disbursement to a class of creditors. Correspondingly, the same would not be in the overall interest of the provisions under IBC. The Court kept the question of home buyers as secured or unsecured creditors open. [*Chitra Sharma and ors.* v. *Union of India and ors.* - Writ Petition (Civil) No. 744 of 2017 (Supreme Court of India)]

No Civil Court has jurisdiction in respect of any matter under IBC when NCLT empowered for same

Key Point:

A civil court while dealing with any matters shall have no jurisdiction under IBC as the NCLT has been provided with such jurisdiction.

Brief Facts:

The appellant had claimed an outstanding amount along with interest in respect of unpaid invoices for the goods supplied to the respondent. A reference was made to the Board of Industrial and Financial Reconstruction ("BIFR"); and since the Sick Industrial Companies Act (Special Provisions), Act, 1985 ("SICA") was repealed, IBC brought into force.

Thereafter, the respondent filed an application before NCLT enclosing the pending company petition, and subsequently, the appellant filed a company application requesting the appointment of a provisional liquidator, in furtherance of which, the NCLT proceedings were restrained.

The present case is an appeal challenging the order of the company judge dated January 5, 2018 whereby vacation of the order dated September 15, 2017 was granted by the judge, on application filed by the respondent, holding that there was no bar on NCLT from proceeding the IBC application of the respondent.

Observations:

Whether since NCLT has been conferred jurisdiction because of special statute of IBC, no Civil Court has jurisdiction in respect of any matter in which it is empowered under the Code?

Held:

It was held that section 63 of the IBC injuncts a civil court to entertain proceedings in respect of any matter on which the NCLT has jurisdiction. However, section 231 emphasises that no civil court shall have jurisdiction in respect of any matter in which the Adjudicating Authority is empowered to pass orders. Additionally, no injunction shall be granted by any court for any action pursuant to any orders passed by such an Adjudicating Authority. Hence, it is manifestly indicated that a special statute has conferred the jurisdiction on NCLT. The court also observed that the Companies Act, 1956 would be treated as a general law, whereas, IBC would be treated as a special statute to the extent of provisions relating to revival or resolution of the company. [*Jotun India Pvt Ltd. V. PSL Limited, Appeal Lodging No. 68 of 2018; 2018 SCC Online Bom 1952 (Bombay High Court*)].

Supreme Court whether expands scope of Arbitration Section 11?

The Supreme Court of India has interpreted the scope of the powers of a court under Section 11 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) while appointing an arbitrator.

To draw context, the Arbitration Act as amended in 2015 provides that the jurisdiction of High Court / Supreme Court while appointing an arbitrator under Section 11 is limited to examining only the existence of an arbitration agreement. Effectively, if an arbitration agreement exists, the Court shall appoint the arbitrator(s) and if not, direct the parties to pursue other remedies available to them. Obviously, the amendment was aimed to reduce court's interference while appointing an arbitrator, leaving any dispute as to the arbitrability of the disputes to be decided by the arbitrator in order to avoid duplication of disputes. This position was also affirmed by the Supreme Court in *Duro Felguera, SA v. Gangavaram Port Limited (2017) 9 SCC 729*.

However, in this present case, the Supreme Court has opined that the Court acting under Section 11 cannot just limit its role to ascertaining mere existence of arbitration agreement but also shall ascertain whether the disputes between the parties are covered by the arbitration clause sought to be invoked by the parties.

Brief facts:

The Petitioner, an insurance company, had provided the Respondent / Contractor with a 'Contractor All Risk Insurance Policy' ("CAR Policy"). The policy contained an arbitration

clause which stated that when a dispute arose with respect to the quantum of claim under the policy the same shall be decided through arbitration. However, the clause clarified that disputes that arise out of repudiation of liability by the Petitioner insurance company cannot be arbitrated upon. The arbitration clause in the Policy Document read as under:

" If any difference shall arise as to the quantum to be paid under this Policy (liability being otherwise admitted) such difference shall independently of other questions be referred to the decision of an arbitrator…It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under or in respect of this Policy..."

Allegedly, an accident occurred causing losses to the contractor. The contractor raised claims under the policy. The Petitioner insurance company on a finding that the accident occurred on account of faulty design and improper execution of the construction, repudiated the claims of the contractor.

The contractor invoked arbitration and sought to appoint an arbitrator to resolve the dispute by arbitration. The Petitioner insurance company resisted on the ground that the disputes arose out of repudiation which cannot be referred to arbitration as they are specifically excluded. An application was filed under Section 11 before the Madras High Court. The High Court relying on Section 11(6A) of the Arbitration Act held that the arbitration agreement existed between parties and nothing was required to be done to commence arbitration. This Order was challenged before the Supreme Court by the insurance company.

Held:

The Supreme Court, setting aside the order of appointment of the arbitrator held that in the present case, no liability was admitted by the insurance company and as a result, the dispute did not pertain to the quantum of compensation payable under the insurance policy but arose out of repudiation. Thus, the disputes were not arbitrable.

The court held that where there since the arbitration specifically stated that arbitration could be invoked only where liability was unequivocally admitted, the arbitration cannot be invoked unless such precondition is fully satisfied. The precondition is thus *sine qua non* for the invocation of the arbitration agreement. This examination according to the Supreme Court was well within the jurisdiction of the Court exercising power under Section 11 of Arbitration Act. [*United India Insurance Co. Ltd. v. Hyundai Engineering and Construction Co. Ltd*. - Civil Appeal No. 8146 of 2018, decided on 21-8-2018, Supreme Court]

NEW DELHI
5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Ph: +91(80) 49331800
Fax:+91(80) 49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail :lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail :lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59,
Sector 26,
Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

GURGAON
OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
phone: +91-0124 - 477 1300
Email: lsgurgaon@lakshmisri.com

ALLAHABAD
3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
phone . +91-0532 - 2421037, 2420359
Email:lsallahabad@lakshmisri.com