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INSOLVENCY & BANKRUPTCY

# Judgment on IBC

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PUBLISHED 2 January 2020

## The Insolvency and Bankruptcy Code, 2016

### SUPREME COURT OF INDIA

### Swiss Ribbons Pvt. Ltd. &Anr.

### Vs

### UOI &Ors

*(Supreme Court of India)*

*(2019) 4 SCC OnLine SC 17*

*(Judgment Dated :-25th January, 2019)*

*"The Defaulters' paradise is lost. In its place, the economy's rightful position has been regained."*

*~ Justice RF Nariman*

The Supreme Court in the matter of Swiss Ribbons Pvt. Ltd. &Anr. v. UOI&Ors upheld the constitutional validity of the Insolvency and Bankruptcy Code, 2016 (the "Code") . The contentious issues were with respect to the classification of creditors into financial creditors and operational creditors; power of Resolution Professional ("RP"); constitutional validity of the Code etc.

The Supreme Court observed the following: –

* While upholding the classification of creditors as financial creditors and operational creditors as nondiscriminatory constitutionally valid, the Court observed that financial creditors usually being the banks and financial institutions, are in a better position to evaluate the feasibility and viability of the Corporate Debtor ("CD") than the operational creditors, who are mainly supplier of goods/services.

* In dealing with the constitutional challenge against Section 12A, which deals with withdrawal of application of Corporate Insolvency Resolution Process ("CIRP") filed by the creditor, the Court held that once a proceeding is initiated against the CD, the proceeding becomes in rem i.e a collective proceeding and cannot be withdrawn individually. Hence, consent of 90% of the creditors has to be taken as per the law and if the Committee of Creditors ("COC") acted arbitrary, it can always be brought to the judicial scrutiny.

* Regarding the powers of the RP, the Court held that no adjudicatory powers have been given to RPs. The RPs are given administrative powers only as opposed to quasi-judicial powers. On the contrary, a determination of the value of claims by the liquidator is quasi-judicial in nature and amenable to judicial review. Lastly, as compared to the liquidator, the RP is fettered by approvals required from the CoC and their general oversight.

* The Court in relation to Section 29A observed that the said section is inserted to disallow the persons, otherwise in default, from purchasing the assets of the CD. It cannot be treated as constitutionally invalid as it safeguards the CD from following the same fate leading to a failure of the resolution envisaged under the Code. The Court went on to add that ineligibility under Section 29A is applicable during liquidation proceedings as well. While interpreting the meaning of the 'related party' under Section 29A, the Court held that disqualification will be only applicable to the related party who has business connection with the resolution applicant and not otherwise.

* The Supreme Court also upheld the constitution validity of Section 53 of the Code on the ground that it creates an intelligible differential between financial debts and operational debts as repayment of financial debt infuses capital into the economy, which can be further used for lending.

**K. Sashidhar**

**Vs.**

**Indian Overseas Bank & Ors**

*(Supreme Court of India)*

*(2019) SCC OnLine SC 257*

*(Judgment Dated :- 5th February, 2019)*

*"The legislature has not envisaged challenge to the "commercial/business decision" of the financial creditors taken collectively or for that matter their individual opinion, as the case may be, on this count".*

*~ Justice A.M. Khanwilkar*

The Hon'ble Supreme Court of India in this held as follows:-

* If CoC approves the resolution plan by the requisite percentage of voting share, it is imperative for the RP to submit the same to National Company Law Tribunal ("NCLT"). On receipt of such proposal, the NCLT is required to satisfy itself that the plan approved by CoC meets the requirements specified in Section 30 (2); no more and no less.

* If the resolution plan is expressly rejected by not less than 25% of voting shares of the financial creditors, the RP is under no obligation to submit the plan to NCLT.

* The scrutiny of the resolution plan is required to pass through the litmus test of not less than requisite voting share – a strict regime.

* Upon receipt of a "rejected" resolution plan, NCLT is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1). The legislature has not endowed NCLT with the jurisdiction or authority to analyze or evaluate the commercial decision of the CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors.

* The Code provides a swift resolution process to be completed within 270 days failing which, initiation of liquidation process is inevitable and mandatory. It grants paramount status to the commercial wisdom of the CoC, without any judicial intervention, for ensuring completion of the processes within the time limit. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before NCLT. That is not justiciable.

* The jurisdiction bestowed upon the appellate authority is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3), which is limited to matters "other than" enquiry into the autonomy or commercial wisdom of dissenting financial creditors. Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the Code and not act as a court of equity or exercise plenary powers.

* The Resolution Professional is not required to express his opinion on matters within the domain of the financial creditors, to approve or reject the resolution plan, under section 30(4)

Please note: The aforesaid decision of the Supreme Court has observed that the amendment to the requisite voting for approval of the resolution plan shall not be applicable to the above-mentioned case and hence the unamended section of the requisite majority of 75% has been mentioned herein. The law as it stands now requires an approval from 66% of the total CoC members and the CIRP period has been extended from 270 days to 330 days.

**Gaurav Hargovindbhai Dave**

**Vs**

**Asset Reconstruction Company (India) Ltd. & Anr.**

*(Supreme Court of India)*

*( 2019) SCC OnLine SC 1239*

*(Judgment Dated: 19th September, 2019)*

*"The present case being "an application" which is filed under Section 7, would fall only within the residuary article 137"*

*~ Justice RF Nariman.*

The Supreme Court in this case examined period of limitation applicable for a petition filed under Section 7 of the Code for initiation of CIRP and observed as follows:

* Supreme Court held that Article 62 of the Limitation Act 1963 (“Limitation Act”), which provides for a period of limitation of 12 years for suit for recovery of money secured by mortgage, will be applicable only for suit and not for an application under Section 7 of the Code.

* Instead, “application” filed under Section 7 of the Code would fall under the residuary Article 137 of the Limitation Act, which provides for a period of limitation of three years from the time when the right to apply accrues.

* The Court further held that limitation period would run only from the date on which the right to sue accrued and not from the date of commencement of the Code.

The issue came into the consideration of the Supreme Court again in Jignesh Shah and Anr. Versus Il&FS (Writ Petition (Civil) No.455 OF 2019), where the Court reiterated that Article 137 of the Limitation Act would be applicable to the application filed under the Code.

**Committee of Creditors of Essar Steel India Limited**
**Vs.**
**Satish Kumar Gupta & Ors.**

*(Supreme Court of India)*
*(2019) SCC OnLine SC 1478*
*(Judgment Dated:-15th November, 2019)*

*“Indeed, if an “equality for all” approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would has better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would defeat the entire objective of the Code which is to first ensure that resolution of distressed assets takes place and only if the same is not possible should liquidation follow.”*

*~ Justice R.F. Nariman*

The Supreme Court in this matter discussed and upheld the constitutional validity of the Code and 2019 ammendments to the Code. In this landmark judgment Supreme Court considered important aspects like jurisdiction of NCLT and the National Company Law Appellate Tribunal (“NCLAT”), role of RP, differentiation of creditors, constitution of subcommittee by CoC, extinguishment of right to subrogation etc.

The Supreme Court observed the following:-

* While considering the jurisdiction of NCLT, the Court reiterated that NCLT cannot interfere on merits with the commercial decision taken by the CoC, the limited judicial review available is to see that the CoC has taken into account the fact that the CD needs to keep going as a going concern during the insolvency resolution process; that it needs to maximize the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If NCLT finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the CoC to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the CoC while approving a resolution plan may thus be looked at by NCLT only from this point of view, and once it is satisfied that the CoC has paid attention to these key features, it must then pass the resolution plan. The limit of the jurisdiction of NCLT is restricted to four corners of Section 30 (2) and that of NCLAT to the grounds provided under Section 32 read with Section 61(3) of the Code. The Court further observed that the residual jurisdiction of the NCLT under Section 60(5)(c) cannot, in any manner, whittle down section 31(1) of the Code, by the investment of some discretionary or equity jurisdiction in NCLT outside section 30(2) of the Code, while adjudicating a resolution plan.

* While considering the role of RP, the Court reiterated that the role is limited to management of affairs of the CD; appoint and convene the meetings of the CoC; collect, collate and admit the claims of the creditors. The powers of the RP are not adjudicatory. The prospective resolution applicant has a right to receive complete information of the CD mentioned in the information memorandum and the evaluation matrix. The prospective resolution applicant must provide for the maximization of assets of the CD, the way in which the creditors are to be paid. The resolution plan must: (a) provide that the amount due to operational creditors shall be given priority in payment over financial creditors; (b) include provisions as to how to deal with the interests of all stakeholders, including financial creditors and operational creditors of the CD; (c) provide for the term of the plan, management and control of the business of the CD during such term, and its implementation; and (d) demonstrate that the plan

is feasible and viable, and that the resolution applicant has the capability to implement the plan.

* The Court justified differential treatment to various kinds of creditors on the ground that equitable treatment can be applied only to similarly situated creditors and cannot be extended to treating unequal as equals. Equitable treatment shall be accorded to different class of creditors considering different class to which they belong such as financial creditors vis-à-vis operational creditors, secured creditors vis-à-vis unsecured creditors etc.

* Fair and equitable dealing of operational creditor's rights involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the CoC to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors. The Court further held that there is no residual jurisdiction to reject a plan on the ground that its unjust for a class of creditors so long as interest of all the class is taken care of.

* While dealing with delegation of power by COC, the Court held that the power of the CoC such as power to approve a resolution plan or power to decide questions relating to running of the affairs of the CD etc. cannot be delegated to any other body. However, CoC can constitute sub-committee for negotiating with resolution applicant or to perform administrative functions etc.

* The Court held that the resolution plan once approved will be binding on all including the creditors, who have not submitted their claim during the prescribed time period to RP. The Court further observed that the guarantors cannot claim right of subrogation against CD after the approval of the plan, if the plan provides for extinguishment of such rights. In this regard, the Court observed that a successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by the successful resolution applicant.

* While reading down the mandatory time period of 330 days for completion of CIRP as introduced by the 2019 amendment to the Code, the Court struck down the term "mandatorily" as being manifestly arbitrary under Article 14 of the Constitution of India and as being unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution. The effect of this declaration is that ordinarily the time taken in relation to the CIRP must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, if the delay or a large part thereof is attributable to NCLT and/or the NCLAT itself, then it may be open in such cases for NCLT and/or NCLAT to extend time beyond 330 days.

* While upholding the requirement of minimum payment to operational creditors, and dissenting financial creditors, the Court observed that Section 30(2)(b) is a beneficial provision in favour of operational creditors and dissenting financial creditors as they are now to be paid a certain minimum amount under the section which was not earlier payable.

## NATIONAL COMPANY LAW APPELLATE TRIBUNAL

### Can a Resolution Plan be less than the liquidation value?

*Maharashtra Seamless Ltd vs Shri Padmanabhan Venkatesh & Ors (Company Appeal (AT) (Insolvency) No. 128 of 2019) (Judgment dated:- 8th April 2019)*

*?*

*Accord Life Spec Private Limited Vs M/s. Orchid Pharma Limited, (Company Appeal (AT) (Insolvency) No. 761 of 2019) (Judgment dated:-13th November, 2019)*

In both the cases, the value proposed in the resolution plan was less than the liquidation value. The question came up before NCLAT whether CoC is right to admit plans whose value is less than the liquidation value.

As per the Code, RP has to determine the liquidation value of the CD, which is an approximate value to be disbursed, in case the resolution fails, and the CD goes into liquidation. The Code is silent on this aspect and NCLAT, in both the cases, refused to accept the plan on the ground that resolution value cannot be less than liquidation value. NCLAT observed that such plan had no provision of the maximization of assets which one of the main objects of the Code and resolution applicant should not be allowed to take the assets of the CD at alesser value then liquidation value.

In Maharashtra Seamless Ltd, NCLAT suggested modification of the plan and instructed the resolution applicant to infuse additional amount to make it par with the average liquidation value. Whereas, in Accord Life Spec Private Limited, NCLAT struck down the plan on the ground that the plan value being less than liquidation value.

Both the matters are currently under the consideration of Supreme Court and the decision is still pending. As the Code is silent on the value of the resolution plan, it is a grey area yet to be cleared by the Supreme Court.

## Restriction on alienation of properties before moratorium

*NUI Pulp and Paper Industries Pvt. Ltd. Vs M/s. Roxcel Trading GMBH (Company Appeal (AT) (Insolvency) No. 664 of 2019) (Judgment dated :- 17th July 2019)*

Under Section 14 of the Code, a moratorium will come into effect upon admission of CIRP against a CD. The provision of moratorium restricts initiation of any suit or legal proceedings for recovery of money against the CD as well as alienation of any property of CD. In the above case, NCLAT examined the power of NCLT to restrict alienation of the property of the CD before the admission of the application of CIRP or before the commencement of moratorium under Section 14.

NCLT, in the instant case, while granting time for CD to file reply to an application to initiate CIRP, restrained the CD from alienating, encumbering or creating any third party interest on its assets till further orders. NCLT made this order by exercising its inherent jurisdiction under Rule 11 of the National Company Law Tribunal Rules 2016. An appeal was preferred, challenging the order of the NCLT on the ground that such restriction can only be exercised after the admission of the application upon declaration of moratorium.

The NCLAT while deciding the appeal held that the inherent powers of NCLT allow it to pass any such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of law. It further held that the NCLT under this rule is not required to wait until the admission of the proceedings and only then declare moratorium under Section 14 of the Code. It was held that in the interest of justice, NCLT can pass such interim as it deems fit, which would include an order of restriction on alienation of assets. The NCLAT, therefore dismissed the petition and refused to interfere with the order of the NCLT.

## Power of NCLT to revive a dissolved Company

*Hemang Phophalia Vs Greater Bombay Co Operative Bank(Company Appeal (AT) (Insolvency) No. 765 of 2019) (Judgment dated:-5th September, 2019)*

Since the inception of the Code, there has been a considerable conflict between the provision of the Companies Act 2013 (“CA”) and the Code. Section 248 of the CA gives powers to the Registrar to remove the name of the company from the Register of Companies. The question before NCLAT that whether NCLT can initiate CIRP against a company whose name has been struck of by the Registrar under Section 248 of the CA.

It was argued on the behalf of the appellant that as the company’s name was struck off from the Register of Companies and hence the said CD was “non-existent”. As a result, CIRP proceedings against a “non- existent’ company is not maintainable. According to the appellant, the company had stopped functioning for more than three years. There were no employees or assets of the company which were available for disbursing funds for the purposes of the CIRP.

NCLATobserved that under Section 248 of the CA the Registrar has to satisfy himself with regard to the pending liabilities of the company while striking off the name. The Registrar also has to ensure that provisions are made for the discharge of liabilities including the dues payable to the employees of the company. NCLAT also referred to Subsection 8 of Section 248, which provides that “Nothing in this section shall affect the power of the Tribunal to wind up a company the name of which has been struck off from the register of companies”. Accordingly, NCLT has the power to wind up the company, even after the name of the company has been stuck off. The NCLAT also referred to Section 252 of the CA which allows NCLT to restore the name of the company dissolved by the Registrar under Section 248, if it is satisfied on an appeal filed by any creditor within three years of such dissolution.

Therefore, NCLAT held that Section 248 of the Companies Act gives powers to NCLT for initiating liquidation/winding up proceedings against the dissolved company. Applying the same principle, NCLAT held that NCLT can initiate CIRP proceeding against a company even if its name has been struck off by the Registrar.

## Scope of jurisdiction of National Company Law Tribunal

*Excel Metal Processors Limited Vs. Benteler Trading International GMBH (Company Appeal (AT) (Insolvency) No. 782 of 2019) (Judgment dated:-21st August, 2019& 18th September 2019)*

In this case, NCLAT considered an appeal against the order of NCLT, Mumbai admitting an application under the Code against CD. The challenge was based upon the preliminary issue of jurisdiction of NCLT Mumbai. Referring to the agreement entered into between the CD and the operation creditor, it was contended that NCLT Mumbai would have no jurisdiction. The jurisdiction of the disputes arising out of the agreement between the parties would be only of Courts at Germany.

The NCLAT held that CIRP is not a 'suit', a 'litigation' or a 'money claim' for any litigation and no one is selling or buying the CD. It is not a recovery or liquidation. The object is mere to get resolution brought about, so that the CD do not default on dues. NCLAT further observed that under Section 408 of the CA, the Government has entrusted all the powers to entertain all matters arising under the Code to NCLT with in whose territory the registered office of the CD is situated.

Therefore, the NCLAT concluded that NCLT, within whose jurisdiction the registered office of the CD is situated, shall have exclusive jurisdiction to initiate CIRP against the CD, notwithstanding anything to the contrary in any agreement.

In a similar Case of *Naresh Kumar Sharma Vs Oriental Bank of Commerce Company Appeal (AT) (Insolvency) No. 628 of 2018 (18.09.2019)* question of jurisdiction was taken up before the NCLAT.
The jurisdiction of the NCLT Delhi was challenged on the basis that the properties of the CD were situated in Uttar Pradesh and hence NCLT Allahabad would have a jurisdiction over the CIRP proceedings of the CD. However such contention was rejected by the NCLAT and it was held that NCLT Delhi would have jurisdiction over the proceedings as the registered office of the CD was in Delhi.

The rule laid down in both of the above judgments by the NCLAT was that the jurisdiction of the NCLT would be determined on the place where the registered office of the CD is situated and not otherwise.