



INSOLVENCY & BANKRUPTCY

The Holder of the Recovery Certificate would be a Financial Creditor and would be entitled to initiate CIRP: Supreme Court

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A Supreme Court Bench comprising Justices L. Nageswara Rao, B.R. Gavai and A.S. Bopanna, in [Kotak Mahindra Bank Limited v. A. Balakrishna and Anr](#) (Civil Appeal No. 689 of 2021), affirmed the view taken in [Dena Bank v. C. Shivakumar Reddy](#) ((2021) 10 SCC 330), and held that as per Section 5(8) and 5(7) of Insolvency and Bankruptcy Code 2016 (“IBC”), a liability in respect of a claim arising out of a Recovery Certificate would be a “financial debt” and the holder of the Recovery Certificate would be a “financial creditor” and would be entitled to initiate Corporate Insolvency Resolution Process (“CIRP”), if initiated within a period of three years from the date of issuance of the Recovery Certificate.

Facts of the Case

[Ind Bank Housing Limited](#) (“IBHL”), gave credit facilities to three companies to which the Corporate Debtor stood as Corporate Guarantor. There was a default on the part of the borrowers and their facilities were termed as Non-Performing Assets. Recovery suits were filed before Madras High Court against all the borrowers and the Corporate Debtor.

During the pendency of suits, Kotak Mahindra Bank Ltd. (“KMBL”) signed a Deed of Assignment with IBHL. Thereafter, KMBL made a compromise with borrowers for the payment of a specified amount. When the borrowers defaulted in paying the said amount, KMBL issued demand notices, and subsequently filed applications under Section 31(A) of the Recovery of Debts and Bankruptcy Act, 1993 (“Debt Recovery Act”), in front of the DRT for issuance of debt Recovery Certificates in terms of the said compromise entered into between the parties. The DRT allowed these applications and issued separate Recovery Certificates dated 7th June, 2017 and 20th October, 2017 against each of the borrower entities and the Corporate Debtor.

Later KMBL filed an application before the NCLT on 5th October, 2018, seeking the initiation of the CIRP against Corporate Debtor, as per Section 7 of IBC, which was admitted by the NCLT on 20th September, 2019. Aggrieved by the order of the NCLT, the Director of the Corporate Debtor filed an appeal before the NCLAT, contending that application filed under the Section 7 of IBC was filed after the expiry of the three year limitation period. NCLAT allowed the appeal vide impugned judgment dated 24th November, 2020, which was later challenged in the Supreme Court.

Contentions

Counsel for the Appellant relied on the Dena Bank case to submit that the Supreme Court has held that once a claim fructifies into a final judgment and order/decree and a certificate of recovery is also issued authorizing the creditor to realize its decretal dues, a fresh right accrues to the creditor to recover the amount specified in the Recovery Certificate. The Counsel for the Appellant further submitted that accordingly, the present appeal deserved to be allowed since the application under Section 7 of the IBC, filed by KMBL, was within the period of three years from the dates of issuance of the Recovery Certificates.

Counsel for the Corporate Debtor supported the decision of the NCLAT on three grounds- a) the initiation of CIRP by KMBL would amount to filing of second proceedings for the very same cause of action and thus would be hit by the doctrine of *res judicata* and particularly, *per rem judicatam*, b) in view of the limited legal fiction under Section 19(22A) of the Debt Recovery Act, the Recovery Certificates can be treated as “decree” only for the limited purposes of initiation of winding-up proceedings, and c) the Dena Bank judgment is *per incuriam* since it was rendered without considering the provisions of sub-Sections (22) and (22A) of Section 19 of the Debt Recovery Act as well as clauses (6), (10), (11) and (12) of Section 3, clauses (7) and (8) of Section 5, Section 6 and Section 14(1)(a) of the IBC.

Observations of the Court

The Supreme Court observed that trigger point for initiation of CIRP is default of claim. It further noted that “52...When the ‘claim’ itself means a right to payment, whether such a right is reduced to a judgment or not, we find that if the contention of the respondents, that merely on a ‘claim’ being fructified in a decree, the same would be outside the ambit of clause (8) of Section 5 of the IBC, is accepted, then it would be inconsistent with the plain language used in the IBC..... the definition is inclusive and not exhaustive. Taking into consideration the object and purpose of the IBC, the legislature could never have intended to keep a debt, which is crystallized in the form of a decree, outside the ambit of clause (8) of Section 5 of the IBC.”

The Supreme Court then proceeded to observe that since the claim arising out of the Recovery Certificate would constitute a financial debt, a natural corollary would be that the holder of such recovery certificate would become a financial creditor under Section 5(7) of the IBC, and would thereby be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of the recovery certificate.

The Supreme Court accordingly allowed the appeal and remanded the matter back to the NCLT for re-consideration on merits.