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I. Supreme Court: Dissenting secured creditor cannot challenge an approved resolution plan basis the value of security held by it over the corporate debtor.

In the matter of ***India Resurgence ARC Private Limited v. M/s Amit Metaliks Limited & Another [Civil Appeal No. 1700 of 2021]*** decided on May 13, 2021 ("**Judgement**") the Supreme Court ("**SC**") held that a dissenting secured creditor cannot challenge an approved resolution plan under the Insolvency and Bankruptcy Code, 2016 ("**IBC**") and insist on a higher amount to be paid to it on the basis of the value of the security interest held by it over the corporate debtor. It was further held that, in the scheme of IBC, every dissatisfaction does not partake the character of a legal grievance and cannot be taken up as a ground of appeal.

Facts

Under Section 62 *(Appeal to Supreme Court)* of IBC, India Resurgence ARC Private Limited ("**Appellant**") sought to question the order dated March 2, 2021 passed by the National Company Law Appellate Tribunal, New Delhi ("**NCLAT**"), whereby the NCLAT rejected its challenge to the order dated October 20, 2020, passed by the National Company Law Tribunal, Kolkata bench ("**NCLT**"), in approval of the resolution plan in the corporate insolvency resolution process ("**CIRP**") concerning the corporate debtor, VSP Udyog Private Limited ("**Respondent No. 2**"), as submitted by the resolution applicant, M/s. Amit Metaliks Limited ("**Respondent No. 1**"). Respondent No. 1 and Respondent No. 2 are collectively referred to as "**Respondents**". The Appellant was the assignee of the rights, title and interest carried by Religare Finvest Limited, as the secured financial creditor of Respondent No. 2, having 3.94% of voting share in the Committee of Creditors ("**CoC**"). When the resolution plan submitted by Respondent No. 1 was taken up for consideration by the CoC, the Appellant became a dissenting financial creditor, basis the share being proposed, particularly with reference to the value of the security interest held by it. However, the resolution plan got the approval of 95.35% of voting share of the financial creditors and was submitted for approval by the resolution professional to the NCLT. The NCLT found the plan to be feasible and viable with judicious distribution of financial bids by CoC to the stakeholders, according to their entitlements as also being compliant of all the mandatory requirements, and thereby approved the resolution plan by its order dated October 20, 2020.

The Appellant had filed an appeal before the NCLAT under Section 61(1) read with Section 61(3) of the IBC, and therein contended that the approved resolution plan failed the test of being 'feasible and viable' in as

much as the value of the secured asset, on which security interest was created by Respondent No. 2, in its favour, was not taken into consideration. Further, the Appellant had contended that after the amendment to Section 30 (4) of IBC, which came into effect from August 16, 2019, the CoC was required to ensure that the manner of distribution takes into account the order of priority among the creditors as also the priority and value of the security interest of a secured creditor. The Appellant had argued that since Respondent No. 1 and the CoC failed to consider the existing security interest in the Appellant's favour, the approval of the NCLT was not in accordance with law.

The NCLAT relied upon the judgement of ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others. [(2020) 8 SCC 531]*** ("**Essar Steel**"), and rejected the Appellant's contentions, on the grounds that considerations including priority in scheme of distribution and the value of security fell within the realm of CoC and such considerations, being relevant only for purposes for arriving at a business decision in exercise of commercial wisdom of the CoC, could not be the subject of judicial review in appeal within the parameters of Section 61(3) of the IBC. Thus, aggrieved by the decision of the NCLAT, the Appellant preferred this instant appeal before the SC.

Issues

1. Whether the orders pronounced and NCLAT was in accordance with the law

2. Whether a dissenting secured creditor can challenge an approved resolution plan on the basis of the value of the security interest held by it over the corporate debtor

Arguments

Contentions raised by Appellant:

The Appellant contended that the CoC could not have approved the resolution plan which failed to consider the priority and value of security interest of the creditors while deciding the manner of distribution to each creditor even though the legislature in its wisdom has amended Section 30(4) of the IBC, requiring the CoC to take into account the order of priority amongst creditors as laid down in Section 53(1) of the IBC, including the priority and value of the security interest of a secured creditor. The amended Section 30(4) of the IBC lays down that "*The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent, of voting share of the financial creditors, after considering its feasibility and viability the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor, and such other requirements as may be specified by the Board […]*"

The primary reason for the Appellant's dissent to the resolution plan was that the Respondent No. 1 had offered the Appellant a meagre amount of about INR 2,02,60,000 (approximately) as against the total admitted claim of INR 13,38,00,000(approximately), without even considering the valuation of the security held by the Appellant, which admittedly had the valuation of more than INR 12,00,00,000(approximately). Further, the Appellant argued that the observation of the NCLAT, deeming that, the amendment to Section 30(4) of the IBC as a mere guideline, failed to take into account the fact that CoC does not have an unfettered and arbitrary right to exercise its commercial wisdom and to approve the plan which does not stand in conformity with the provisions of the IBC.

Observations of the Supreme Court

The SC observed that the process of consideration and approval of resolution plan is essentially that of the commercial wisdom of the CoC and the scope of judicial review was limited within the four-corners of Section 30(2) of the IBC for the NCLT, and Section 30(2) read with Section 61(3) of the IBC for the NCLAT. It was observed that if all the mandatory requirements have been duly complied with and taken care of, the process of judicial review cannot be stretched to carry out quantitative analysis *qua* a particular creditor or any stakeholder, who may carry his own dissatisfaction. In the scheme of IBC, every dissatisfaction does not partake the character of a legal grievance and cannot be taken up as a ground of appeal. The SC opined that the provisions of the amended Section 30(4) of the IBC do not warrant interference with the resolution plan at the instance of the Appellant. Placing reliance on Essar Steel (supra) with regards to the purport and effect of the amendment to Section 30(4) of the IBC, the SC affirmed the observation of the NCLAT, that the amendment to Section 30(4) of the IBC only amplified the considerations for the CoC while exercising its commercial wisdom, to take an informed decision in regard to the viability and feasibility of resolution plan, with fairness of distribution amongst similarly situated creditors. Further, the SC upheld the view of the NCLAT that the business decision taken in exercise of the commercial wisdom of CoC does not call for interference, unless creditors belonging to a class being similarly situated are denied fair and equitable treatment. The SC noted that the proposal for payment to all the secured financial creditors was equitable and the proposal for payment to the Appellant was at par with the percentage of payment proposed for other secured financial creditors. The SC observed that, there was no case of denial of fair and equitable treatment or disregard of priority and pointed out that determining the amount to be paid to different classes or subclasses of creditors in accordance with provisions of the IBC and the related regulations, was essentially the commercial wisdom of the CoC, and a dissenting secured creditor like the Appellant could not suggest a higher amount to be paid to it with reference to the value of the security interest.

The SC noted that in ***Jaypee Kensington Boulevard Apartments Welfare Association and Others. v. NBCC (India) Limited and Others [Civil Appeal No. 3395 of 2020]***, the SC had repeatedly made it clear that a dissenting financial creditor would receive the payment of the amount as per his entitlement, and that entitlement could also be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him. It had never been laid down that if a dissenting financial creditor had security available with him, he would be entitled to enforce the entire security interest or to receive the entire value of the security available with him. His dealing with the security interest would be conditioned by the extent of value receivable by him.

The SC observed that the extent of value receivable by the Appellant was distinctly laid out in the resolution plan that is, a sum of INR 2,02,60,000 (approximately) which was in the same proportion and percentage as provided to the other secured financial creditors with reference to their respective admitted claims, The SC observed that, the repeated reference of the Appellant to the value of security at about INR 12,00,00,000 (approximately) as wholly inapt and ill-conceived.

The SC remarked that if the Appellant's propositions were to be accepted, it would result in more liquidation with every secured financial creditor opting to stand on dissent, as against insolvency resolution and value maximization of the assets of the corporate debtor, thereby defeating the very purpose envisaged by IBC. The SC relied on the observation made in Essar Steel (supra) that if an "equality for all" approach recognizing the rights of different classes of creditors as part of an insolvency resolution process was adopted, secured financial creditors would be incentivized to vote for liquidation rather than resolution, as they would have 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 IBC, which is to first ensure that resolution of distressed assets takes place and only if the same is not possible should liquidation follow.

Decision of the Supreme Court

It was held by the SC that the financial proposal in the resolution plan forms the core of the business decision of the CoC. The SC further held that the limitation on the extent of the amount receivable by a dissenting financial creditor is innate in Section 30(2)(b) of the IBC and it was not the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors. The SC, thus, rejected the contentions of the Appellant.

VA View:

Through this Judgement, the SC has confirmed that a dissenting secured creditor cannot challenge a resolution plan approved under the IBC with an argument that higher amount should have been paid to it, in light of the value of the security interest held by it over the corporate debtor. Recognizing the supremacy of the commercial wisdom of the CoC, the SC has reiterated the limited scope of judicial review and interference in business decisions that fall under the ambit of the commercial wisdom of the CoC.

The SC has rightly upheld the integral principles of IBC that is value maximization of the assets of the corporate debtor, and insolvency resolution, as against liquidation. The SC has clarified that any entitlement extended to creditors on the basis of the value of security would defeat the purpose of IBC as it would result in the financial creditors dissenting and opting for liquidation as against insolvency resolution.

II. Karnataka High Court: If the departments of 'Central' or 'State' government(s) do not file an application or participate in the corporate insolvency resolution process, their claims automatically get extinguished

The High Court of Karnataka ("**KHC**") has in its judgment dated May 27, 2021 ("**Judgement**"), in the matter of ***Union of India and Others v. M/s. Ruchi Soya Industries Limited [Writ Appeal No.2575/2018 (T-TAR)],*** held that if the departments of Central or State government(s) do not file an application or participate in the resolution process, their claims automatically get extinguished.

Facts

M/s Ruchi Soya Industries Limited ("**Respondent**"), is a public limited company registered under the provisions of the Companies Act, 1956. The Respondent entered into a contract on July 27, 2015 with 'M/s. Aavanti Industries Private Limited, Singapore,' for import of 10,000 metric tons of 'Crude Palm Oil of Edible Grade' in bulk. On September 16, 2015, four bills of entry had received clearance. The Respondent, as per 'Notification No.12/2012-Cus' dated March 17, 2012, was liable to pay duty at 7.5% ("**Notification**"). The goods arrived at Mangalore Port on September 17, 2015. Coincidentally, on the very same day another notification was issued enhancing the customs duty from 7.5% to 12.5% ("**Impugned Notification**"). Under the aforesaid circumstances, the Commissioner and Deputy Commissioner of Customs, ("**Appellants**") sought for payment of differential duty on the subject goods on

the basis of Section 15 (*Date for determination of rate of duty and tariff valuation of imported goods*) of the Customs Act, 1962 ("**Act**"). The Respondent contended that the Appellants were not right in demanding the enhanced duty at the rate of 12.5% as per the Impugned Notification on September 18, 2015 as that was subsequent to the assessment of the bills of entry already made on September 16, 2015. Therefore, the Respondent had initially filed a petition before KHC, seeking a declaration that the reassessment of the bills of entry on September 18, 2015, consequent to issuance of the Impugned Notification and demanding the higher rate of duty was illegal. The learned 'Single Judge' of KHC held that, the Impugned Notification was not applicable to the subject goods and that, the Appellants could not claim the differential rate of duty on the basis of the said Impugned Notification. Consequently, the demand made to pay differential duty was quashed and it was declared that the importer was liable to pay duty at 7.5% based on the Notification only. Being aggrieved by the order of the learned 'Single Judge', the Appellants preferred the said appeal before a division bench of KHC.

The matter was listed along with an application (I.A.No.1/2021) seeking dismissal of the said appeal based on Section 31 *(Approval of resolution plan)* of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") on the premise that no proceeding could have been initiated for recovery of the dues from the Respondent, which is a corporate debtor within the meaning of the provisions of the IBC. This was because, the dues were not part of the resolution plan approved by the National Company Law Tribunal ("**NCLT**") under Section 31 of the IBC. Moreover, based on the judgement of Hon'ble Supreme Court ("**SC**") in the case of ***Ghanashyam Mishra and Sons Private Limited through the Authorized Signatory v. Edelweiss Asset Reconstruction Company Limited through the Director [2021 SCC Online SC 313]***, the claims of the Appellants as well as the liability of the Respondent, would stand extinguished permanently.

In an affidavit in support of the application, the Respondent stated that, by an order dated December 08, 2017 read with an order dated December 15, 2017, the NCLT had admitted the petition filed and the corporate insolvency resolution process had commenced. Thereafter, a public notice inviting claims from all the creditors of the respondent was issued by the interim resolution professional on December 21, 2017. No claim was filed by the Appellants. In terms of the provisions of IBC, a resolution plan was submitted by the consortium of Patanjali Ayurved Limited, Divya Yog Mandir Trust (through its business undertaking, Divya Pharmacy), Patanjali Parivahan Private Limited and Patanjali Gramudhyog Nyas with the resolution professional. The resolution plan was approved by the committee of creditors of the Respondent on April 30, 2019 as per Section 30(4) of the IBC and the orders dated July 24, 2019 and September 04, 2019 were passed by the NCLT in terms of Section 31 of the IBC.

Issue

Whether the claims of the departments of Central or State Government(s), automatically get extinguished, if they do not file an application or participate in the corporate insolvency resolution process.

Arguments

Contentions raised by the Appellants:

It was submitted by the Appellants that it was not known, whether, the claim of the Appellants was a part of the resolution plan *vis-à-vis* the Respondent. It was further submitted that, if the said claim, which was in the nature of an operational debt, was covered under the resolution plan and if the Appellants succeeded on merits, they could initiate proceedings for recovery of the dues from the Respondent.

Contentions raised by the Respondent:

The Respondent contended that the Appellants had not produced any evidence to establish the fact that the dues to the Appellants were part of the resolution plan. The Respondent relied on the judgement of Ghanashyam Mishra (supra) wherein the issue raised in the instant case had been answered in favour of the Respondent, in as much as a creditor, including the Central Government and State Government or any local authority, is bound by the plan under Section 31(1) of the IBC. The SC in Ghanashyam Mishra (supra) laid down that the said authorities are not entitled to initiate any proceeding for recovery of any of the dues from the corporate debtor, if the operational debt is not a part of the resolution plan approved by the adjudicating authority. It was submitted that, in Ghanashyam Mishra (supra) it has also been held that, the amended Section 31 of the IBC is clarificatory, declaratory and substantive in nature. Therefore, it was submitted that, the claim of the Appellants be held to have abated.

It was further submitted that the resolution plan was successfully implemented on December 18, 2019, and there was a change in the control and ownership of the present Respondent with effect from that date. It was further submitted that as per Section 32A *(Liability for prior offences)* of the IBC, upon completion of the corporate insolvency resolution process, the liability of the corporate debtor would cease as the said provision has a non-obstante clause. It was further submitted that the present proceedings concerning the subject import leading to demand of the duty relates to the year 2015, that is, a period prior to the commencement of the corporate insolvency resolution process and in any case, the same relates to the period prior to the effective date under the resolution plan and therefore, the same shall stand extinguished. It was further submitted that, therefore, the prayer in the application to dismiss this appeal was infructuous.

It was contended that since the dues claimed by the Appellants was within the scope of 'operational debt', the Central Government would be the 'operational creditor' as defined under Section 5(20) of the IBC. The dues to the Central Government including the statutory dues would be covered within the definition of "operational debt" owed to a creditor, in terms of Section 3(10) of the IBC. Unless the statutory dues owed to the Central Government are covered or made part of the resolution plan, it would stand extinguished.

Observations of the Karnataka High Court

The KHC noted that, the SC in the case of Ghanashyam Mishra (supra) answered the key issues, pertaining to whether any creditor including the Central Government, State Government or any local authority is bound by the resolution plan once it is approved by NCLT under Section 31(1) of the IBC and whether, after the approval of the resolution plan by the NCLT, is a creditor including the Central Government, State Government or any local authority entitled to initiate any proceedings for the recovery of any of the dues from the corporate debtor, which are not a part of such an approved resolution plan.

The KHC noted that the objective of the IBC was to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of government dues and for matters connected therewith or incidental thereto. The KHC noted that Section 2 *(Application*) deals with the application of the IBC to the entities mentioned under the IBC. The KHC noted the submissions made by the Respondent that since the dues claimed by the Appellants were within the scope of 'operational debt', the Central

Government would be the 'operational creditor', and unless the said statutory dues owed to the Central Government is covered in the resolution plan, it would stand extinguished. The KHC affirmed that this contention of the Respondent was in consonance with the judgement passed in Ghanashyam Mishra (supra).

The KHC noted that by an amendment to the IBC in 2019 ("**2019 Amendment**"), the following words were inserted in Section 31 of the IBC, that is, "*including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed*."

The KHC noted that, the SC in the case of Ghanashyam Mishra (supra) had arrived at the following conclusions that:

i. Once a resolution plan is duly approved by the adjudicating authority under Section 31(1) of the IBC, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stake holders. On the date of approval of the resolution plan by the NCLT, all such claims, which are not a part of the resolution plan, shall stand extinguished and, no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan.

ii. The 2019 Amendment is clarificatory and declaratory in nature and therefore will be effective from the date on which the IBC came into effect, that is, May 28, 2016.

iii. Consequently, all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under Section 31 of the IBC, could be continued.

The KHC noted that a bare reading of Section 31 of the IBC made it abundantly clear, that once a resolution plan is approved by the NCLT, on being satisfied, that the resolution plan, as approved by the committee of creditors, meets the requirements, as referred to in Section 30(2) of the IBC, it would be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders. Further, the SC, in Ghanashyam Mishra (supra), deemed such a provision as necessary since one of the dominant purposes of the IBC is the revival of the corporate debtor and to make it a running concern.

The KHC noted the reliance placed by the Respondent on the case of ***Ultra Tech Nathdwara Cement Limited vs. Union of India in D.B. [Civil Writ Petition No.9480/2019]***, wherein it was observed that since the 2019 Amendment was clarificatory and declaratory in nature, it would have a retrospective operation. The KHC further noted the observation of the SC in Ultra Tech (supra), that, if the resolution plan, approved by the NCLT, does not comprise all the claims of the Central or State Governments or the local authority, all claims shall stand extinguished and the proceedings relating thereto shall stand terminated. Hence, the SC in Ultra Tech (supra) held that, with regard to any claim prior to the approval of the resolution plan cannot be continued and would stand extinguished, if not made a part of the plan. Thus, the claims which are not part of the resolution plan, shall stand extinguished.

The KHC noted, that it was clear, that the mischief, which was noticed prior to amendment of Section 31 of the IBC was, that though the legislative intent was to extinguish all such debts owed to the Central Government, any State Government or any local authority, including the tax authorities, once an approval was granted to the resolution

plan by NCLT, on account of there being some ambiguity, the State/Central Government authorities continued with the proceedings in respect of the debts owed to them. In order to remedy the said mischief, the legislature thought it appropriate to clarify the position, that once such a resolution plan was approved by the adjudicating authority, all such claims/dues owed to the State/Central Government or any local authority including tax authorities, which were not part of the resolution plan, shall stand extinguished. The KHC noted that, the legislative intent behind allowing such extinguishment of claims was, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. Further that if, such extinguishment of claims was not permitted, the very calculations on the basis of which the resolution applicant submits its resolution plan, would go haywire and the plan would be unworkable.

The KHC noted that the provisions of Section 238 *(Provision of this code to override other laws)* of the IBC states that the provisions of the IBC shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Further, it was noted that crown debts do not take precedence even over secured creditors, who are private persons. This was clear on a reading of Section 238 of the IBC, which provides for the overriding effect of the IBC, notwithstanding anything inconsistent contained in any other law for the time being in force or effect by any such law.

Decision of the Karnataka High Court

The KHC held that, if the departments of the Central or State Governments do not file an application or participate in the resolution process, their claims automatically get extinguished having regard to the judgment of the SC in the case of Ghanashyam Mishra (supra). Therefore, the appeal was dismissed on merit and the application in I.A.No.1/2021 was allowed.

VA View:

The KHC in this Judgement has rightly observed that, the legislative intent of making the resolution plan binding on all the stake-holders on approval from the NCLT, which depends upon NCLT's satisfaction, that the resolution plan as approved by committee of creditors meets the requirement as referred to in Section 30(2) of the IBC. In other words, as per the scheme of IBC, after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant. The legislature, noted that on account of an obvious omission, that is, since governmental authorities were not mentioned in Section 31 of the IBC, certain tax authorities were not abiding by the mandate/scheme of IBC and were continuing to pursue recovery proceedings against the corporate debtor. Consequently, the legislature brought out the 2019 amendment so as to cure the said mischief.

The dominant purpose is, that a resolution applicant should start with a fresh slate on the basis of the approved resolution plan. Consequently, the corporate debtor should be revived and made to function as a running establishment in the form of a going concern.

III. NCLAT: The commercial wisdom of the committee of creditors is paramount and could not be interfered with.

The National Company Appellate Law Tribunal ("**NCLAT**") by order dated May 05, 2021, in the matter of ***Ramasamy Palaniappan v. Radhakrishnan Dharmarajan and Others [Company Appeal (AT) (CH) (Ins.) No. 19 of 2021] with Chandrasekaran v. Radhakrishnan Dharmarajan and Others [Company Appeal (AT) (CH) (Ins.) No. 20***

of 2021] held that, commercial wisdom of the committee of creditors is paramount and could not be interfered with and thereby upheld the order passed by the NCLT, Chennai bench ("**NCLT**") dated December 23, 2020 in IA No. 1001 of 2020 in IBA/1459/2019 ("**NCLT Order**").

Facts

The NCLT had admitted the petition and the corporate insolvency resolution process ("**CIRP**") had been initiated against the respondent no. 3 herein, M/s Appu Hotels Limited ("**Corporate Debtor"**) by virtue of the NCLT Order. Consequently, Mr. Mukesh Gupta was appointed as interim resolution professional ("**IRP**"). The IRP made a public announcement on May 08, 2020 and therein the last date for submission of claims was stated as May 21, 2020.

Meanwhile, the suspended director of the Corporate Debtor filed a petition before Madras High Court ("**MHC**") challenging the NCLT Order. By an order dated May 20, 2020, the MHC stayed the constitution of the committee of creditors ("**CoC**") by three weeks, that is, till June 10, 2020.

Subsequently, on September 04, 2020, the CoC appointed Mr. Radhakrishnan Dharmarajan as the Resolution Professional ("**RP**"). During the CIRP, due to lockdowns imposed as a result of the Covid-19 pandemic ("**Pandemic**"), certain activities under CIRP could not be completed. Moreover, the statutory time period of 180 days was to terminate on November 04, 2020. Thereafter, in one of its meetings on November 12, 2020, the CoC passed a resolution with 100% voting to seek an extension of the CIRP period by excluding 179 days (May 05, 2020 to October 31, 2020) from the CIRP period.

The NCLT considering the situation of the Pandemic had allowed an application filed by the RP, under Section 12(2) *(time limit for completion of insolvency resolution process),* of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). Thereby, NCLT allowed the exclusion of such period (May 05, 2020 till October 31, 2020) from the ambit of CIRP to provide benefit available therein in terms of Section 12(2) of IBC, and under Regulation 40 C*(special provision relating to time-line)* under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 ("**Regulation 40 C**"). This NCLT Order was challenged by Mr. Ramasamy Palaniappan, an equity shareholder of the Corporate Debtor and Mr. Chandrasekaran ("**Appellants**") before the NCLAT.

Issue

Whether the RP had committed a categorical violation of Regulation 40 C by not considering the interests of all stakeholders.

Arguments

<u>Contentions of the Appellant</u>s:

The Appellants submitted that, the NCLT had invoked the power under Regulation 40 C, and granted a mechanical extension of 179 days from the CIRP period without complete exclusion of the timelines and the activities undertaken during the lockdown period. This would have helped render considerable benefit to all the stakeholders. The petition filed by the financial creditor (respondent no. 2 herein), was admitted by the NCLT during the lockdown period by virtue of the NCLT Order. Subsequently, the IRP was appointed who then invited

claims, constituted the CoC and conducted a few meetings of the CoC between June 22, 2020 and October 12, 2020. Thereafter 'Form G' *(invitation for expression of interest)* was issued, and thereby expression of interest was submitted by bidders. There were multiple issues raised, firstly CoC had raised an issue about the value of the resolution plan was far below the liquidation value and secondly, due to the lockdown situation many interested applicants were unable to submit their expression of interest and that it would have been commercially prudent to grant additional time.

The Appellants submitted that, the RP committed violation of Regulation 40 C, by not considering interests of stakeholders and merely sought exclusion of time to complete formalities. The RP had not considered the interests of the Corporate Debtor to be a going concern. The RP should have sought complete exclusion of the timeline and the activities undertaken during the excluded period to render a considerable benefit to all the stakeholders. Regulation 40 C, had been introduced for a much bigger purpose which would be for the benefit of the Corporate Debtor, and the stakeholders of the Corporate Debtor.

The NCLT had extended the CIRP timeline under Section 12(2) of the IBC and not by application under Regulation 40 C (which was fundamentally different from the extension provided under the IBC since the former was to protect the interests of all the stakeholders) and hence, it was mandatory to consider the same before granting exclusion. Further, Section 12(2) of the IBC only permitted 90-days extension, whereas Regulation 40 C qualified for excluding the entire period of inactivity.

Moreover, the RP did not attempt to safeguard the valuable assets of the Corporate Debtor and had presented the plan of the resolution applicant, which took care of just the minimum requirement as prescribed under the IBC, by paying back only the financial, secured, unsecured and operational creditors. The members of the CoC had also felt that the resolution plan amount was far lower than the liquidation value of the Corporate Debtor and hence had even suggested re-invitation of expression of interest and the re-issuance of 'Form G'. The RP, however, did not take any steps to obtain a better offer and mindlessly proceeded ahead with the CIRP formalities. The RP had acted entirely against the object of the IBC, which was enhancement of entrepreneurship and maximization of value of the Corporate Debtor's assets while balancing the interests of all stakeholders. Thirdly, there was an entire halt in economic activities during the Pandemic. The RP had not taken into account that the said period could not be conducive to carrying out vital activities such as valuation of the Corporate Debtor and preparation of information memorandum to seek potential resolution applicants to offer their bid.

<u>Contention raised by the RP and the Corporate Debtor</u>:

Regulation 40 C was an enabling provision that allowed the RP to seek approval of the NCLT for exclusion, if any, of the activities which could not be completed due to the lockdown. It was not the case before the NCLT that no process could be initiated during the lockdown period. On the other hand, some of the activities which could not be completed, warranted an exclusion. The NCLT was satisfied with the material evidence placed before it and concluded that such exclusion was required. The grant of time by the NCLT, therefore, could not be made the subject matter of an appeal. The Appellant was questioning the NCLT Order, which had been made based on an application filed with the requisite approval of CoC. It was contended that the entire CIRP had been conducted as per the procedure under IBC. The Appellant who was holding some equity shares in the Corporate Debtor had filed the appeal only to delay the CIRP and to bring about a halt to the approval of the resolution plan. Further, the CoC had approved the resolution plan with a majority of 87.34%, which was now pending consideration of the NCLT.

Observation of NCLAT

The NCLAT noted that the appeal had been filed *inter alia* on the ground that the RP had violated Regulation 40 C by not considering the interests of all stakeholders and was merely seeking exclusion of time to complete the formalities in the capacity of an RP. It was observed that, the valuation of the Corporate Debtor being INR 1600 crores was unsupported by any evidence. However, the resolution plan amount had been arrived after following the procedure under the IBC. In the case of ***Maharashtra Seamless Limited. v. Padmanabhan Venkatesh, [(2020) 11 SCC 467]*** the Supreme Court ("**SC**") held that, so long the resolution plan met the other requirements of Section 30(2) of the IBC and was approved by the 'committee of creditors', judicial review of such decision of was not permitted. The resolution of the CoC to seek exclusion of time from CIRP was a commercial decision that could not be questioned before the NCLT or the NCLAT.

Considering the contention of the Appellant in respect of Regulation 40 C, it was noted by NCLAT that, the said regulation had been introduced to meet the eventualities of the Pandemic. It was stated that the period of lockdown imposed by the central government in the wake of the Pandemic shall not be counted for the timeline for any activity that could not be completed due to such lockdown about a CIRP. The RP, in this case, had conducted the CIRP in the timeline as per the provisions of the IBC, and when required, had invoked Regulation 40 C. It excluded the timeline for the activities that could not be performed due to the lockdown during the CIRP. Per contra, the activities performed and completed during the lockdown in a given timeline could not be invalidated on account of Regulation 40 C. Moreover, on perusal of the minutes of meeting of the CoC held on November 12, 2020, it appeared that the RP had apprised the CoC about the legal options available – that is, (i) to seek an extension of the timeline for submission of resolution plan or (ii) to make the decision for publication of fresh 'Form-G'. It was the CoC's commercial decision that, *"no extension of time for submission of Resolution Plan should be done and RP was directed to expedite the valuation process and check the feasibility and viability of the Resolution Plan already submitted and present the eligible Resolution Plan before the CoC for consideration."*

The NCLAT noted that the SC had already laid down in the case of ***K. Sashidhar v. Indian Overseas Bank and Others [(2019) 12 SCC 150]*** that the commercial wisdom of CoC was paramount and that judicial intervention was not permitted. Therefore, the decision of the CoC to not seek extension of the timeline for submission of resolution plan was a commercial decision, which was not justiciable.

The NCLAT observed that, the Appellant, moreover, was not a necessary party and the NCLT on being satisfied with the reasons adduced by the RP and material evidence placed before it had granted an exclusion. The NCLAT observed that, the allegation that the CIRP had been conducted in undue haste during the lockdown could not be a ground for the Appellant to challenge the NCLT Order, merely because Regulation 40 C was introduced. Further the contention that, introduction of Regulation 40 C would make it imperative for the RP to invoke it for extending the timeline as a matter of routine was incorrect.

The NCLAT further observed that, the RP had conducted the CIRP as per timelines. When required, the RP had invoked Regulation 40 C and sought exclusion of 179 days while calculating the CIRP period. In addition, it was also noted that Section 12(2) of the IBC empowered the NCLT to extend the timeline for completion of CIRP beyond 180 days on the basis of the resolution of the CoC which is passed with a minimum 66% of voting share. The second proviso to Section 12(3) of the IBC further empowered the NCLT to extend the timeline for completion of CIRP up to 330 days. The SC's decision in ***Kalpraj Dharamshi v. Kotak Investment Advisors Limited [2021 SCC Online SC 204]*** was also considered, herein, the SC had held that commercial wisdom of CoC was not to be interfered with,

excepting the limited scope as provided under Sections 30 and 31 of the IBC. In this case, the SC had also noted that though there had been material irregularity in exercise of powers by RP, all actions of the RP have the seal of approval of the CoC.

Decision of NCLAT

In this case, even though Regulation 40 C could have been applied for exclusion of 179 days on account of the unprecedented situation created by the Pandemic and some of the financial creditors had opined for fresh publication of 'Form G' for the invitation of expression of interest, the CoC had unanimously decided only for seeking exclusion of 179 days, that is from May 05, 2020 to October 31, 2020, for completion of CIRP. The CoC, also, under its commercial wisdom, did not prefer for publication of 'Form-G' afresh to invite an expression of interest. Therefore, it was held that, such a decision of the CoC was not justiciable, and the decision of the NCLT warranted no interference.

VA View:

The NCLAT reiterated that the commercial wisdom of the CoC has to be given paramountcy and could not be interfered with. It has been recognized by the SC that the CoC acts on the basis of thorough assessment and examination of the resolution plan. To intervene, in such a case, would unfold the commercially thought-out decision(s) made by the CoC. It is very clear from the facts and as has been noted by the SC in a catena of judgements, that, the legislature, consciously has not provided any ground to challenge the CoC's commercial wisdom.

The RP need not to invoke Regulation 40C as a matter of routine in lieu of Section 12(2) of the IBC, since it provides for an exclusion of the timeline (for completion of CIRP) for any activity that could not have been performed given the lockdown due to the Covid-19 outbreak.

IV. NCLAT: Withdrawal of corporate insolvency resolution process proceedings filed against the corporate debtor allowed, prior to the constitution of the committee of creditors.

The National Company Law Appellate Tribunal, New Delhi ("**NCLAT**") has in its judgment dated July 07, 2021 ("**Judgement**"), in the matter of ***Anuj Tejpal v. Rakesh Yadav and Another [I.A. No. 815 of 2021 in Company Appeal (AT) (Insolvency) No. 298 of 2021],*** allowed withdrawal of corporate insolvency resolution process ("**CIRP**") proceedings filed against the Corporate Debtor (*defined below*) prior to the constitution of the committee of creditors ("**CoC"**). The NCLAT further held that, in the interest of justice, the inherent powers can be exercised by both National Company Law Tribunal ("**NCLT"**) and NCLAT, who may allow or disallow the application of withdrawal keeping in view the interest of the concerned parties and the facts of each case.

Facts

Mr. Anuj Tejpal ("**Appellant**"), an erstwhile 'Director' of 'OYO Hotels and Homes Private Limited' ("**Corporate Debtor"**) preferred the instant appeal ("**Appeal**"), under Rule 11 (*Inherent Powers*) of the National Company Law Appellate Tribunal Rules, 2016 ("**NCLAT Rules**"). The Appeal was filed against the order of NCLT dated March 30, 2021 ("**Impugned Order**") in view of an amicable settlement arrived at between the concerned parties. The NCLT by virtue of the Impugned Order had admitted the application, filed under Section 9 of the IBC, for initiation of

CIRP against the Corporate Debtor and not 'Mypreferred Transformation and Hospitality Private Limited' (**"MTH"**), the sister concern of the Corporate Debtor being a distinct legal entity.

The Corporate Debtor (*erstwhile Alcott Town Planners Private Limited*) had executed a 'Management Services Agreement' dated November 16, 2018 (**"MSA"**) with Mr. Rakesh Yadav, the respondent no. 1 herein (**"Operational Creditor"**), to manage and operate 'Hotel Yellow White Residency' for which the Operational Creditor had received as security deposit INR 13,50,000 in addition, to an investment of INR 14,25,098/- as capital expenditure, made by the Corporate Debtor. During the subsistence of MSA, all rights and liabilities were transferred to MTH, with effect from June 01, 2019. MTH revised the MSA on July 17, 2019 wherein the benchmark revenue payable to the Operational Creditor was modified. MTH had made the payments as per modified commercial terms. Thereafter, the Operational Creditor issued demand notices under Section 8 of the IBC, for default in payment, dated September 13, 2019, pertaining to the period of July 2019 to September 2019 amounting to INR 7,02,000/- and another demand notice dated November 11, 2019 for the period pertaining to July 2019 to November 2019 amounting to INR 16,02,000/-("**Demand Notices**"). It was stated that, the Demand Notices were incorrectly addressed to the Corporate Debtor, when all the rights and obligations under MSA were vested with MTH.

The NCLAT by an order dated April 08, 2021, issued a notice and suspended the constitution of the CoC of the Corporate Debtor, based on the submission that, the Operational Creditor had wrongly proceeded against the Corporate Debtor instead of MTH, and that, MTH had already paid all the amounts claimed by the Operational Creditor. It had also been submitted that, all efforts would be made to reach an amicable settlement with the Operational Creditor under Section 12-A (*Withdrawal of application admitted under Sections 7, 9 or 10*) of the Insolvency and Bankruptcy Code, 2016 ("**IBC"**). Subsequently, the Operational Creditor had issued a letter dated April 23, 2021 to the effect that, all disputes, claims and counter claims of the Operational Creditor *qua* both the Corporate Debtor as well as MTH stood settled to the full satisfaction of the parties. It was also submitted that, the interim resolution professional ("**IRP**") had received the payment towards the total expenses incurred by him and there was no further amount outstanding in this regard.

During the pendency of the Appeal, certain intervention applications were filed by a few intervenors including 'Federation of Hotel and Restaurant Associations of India' among others with regard to their respective claims.

Issue

Whether NCLAT can exercise its inherent powers under Rule 11 of NCLAT Rules to allow withdrawal of CIRP proceedings, prior to constitution of CoC of the Corporate Debtor.

Arguments

<u>Contentions raised by the Appellant:</u>

The Appellant submitted that, since the settlement was arrived at prior to the constitution of the CoC, the question of applicability of Section 12-A of the IBC did not arise in this case. This was not an application under Section 12-A of the IBC and therefore Regulation 30-A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") and the procedure thereunder was not applicable to the facts of this case. Further that, NCLAT had exercised its inherent power under Rule 11 of NCLAT Rules in several precedents and therefore it could not be said that only NCLT had the inherent powers under Rule

11 of NCLT Rules, 2016 ("**NCLT Rules**").

The Appellant further contended that the intervention applications were not maintainable at this stage of Appeal due to the settlement arrived at between the parties. Further that the intervention applications were contrary to the settled principles of law laid down in ***Swiss Ribbons Private Limited and Others. v. Union of India and Others [(2019) 4 SCC 17],*** among others that the scope of the IBC is meant for 'revival' of the Corporate Debtor. Further that, the proposed intervenors were not allowed to contest the merit of the Appeal or contest the settlement of the subject dispute as proceedings under the IBC were not debt recovery proceedings. The proposed intervenors could come into existence only on the constitution of CoC as per the provisions of the IBC and till then they had no *locus standi* to object a settlement. Further that, Section 14 of the IBC bars the filing of any application against the Corporate Debtor under Sections 7 and 9 of the IBC during the moratorium period and that the proposed intervenors had not placed any documents on record to substantiate any 'debt' or 'default'. Therefore, in view of the settlement between the Operational Creditor and MTH, no other purported claimant could object to the setting aside of the CIRP against the Corporate Debtor.

The Appellant submitted that, great prejudice would be caused to the Corporate Debtor in view of the subsistence of the CIRP proceedings despite having settled the matter with Operational Creditor. Further that the CIRP proceedings would lead to loss of goodwill and reputation, loss of perspective investments and serious administrative difficulties in collection of revenue from the existing partners, disbursement of payments to dependent hotel owners, vendors and employees.

Observations of the NCLAT

The NCLAT noted that, Section 12-A of the IBC refers to a situation which is post constitution of CoC, whereas Regulation 30-A(1)(a) of CIRP Regulations deals with procedure to be followed before the constitution of CoC.
The NCLAT noted that Regulation 30-A of the CIRP Regulations was amended with effective from July 25, 2019.
and reads as mentioned below:

" 1. An application for withdrawal under section 12A may be made to the Adjudicating Authority –

(a) before the constitution of the committee, by the applicant through the interim resolution professional".

Further that, Section 12-A of IBC read together with amended Regulation 30-A of the CIRP Regulations provided that stage of pre-constitution of CoC would be covered under the Regulation 30-A(1)(a) of the CIRP Regulations.

The NCLAT further also referred to Rule 11 of NCLAT Rules, which provides that, *"Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal""*

The NCLAT observed that in the judgment *in* ***Jogender Kumar Arora v. Dharmendar Sharma and Others [Company Appeal (AT) (Insolvency) No. 94, 95 of 2019]*** it was held that, the NCLAT had inherent powers under NCLAT Rules to decide on an application for withdrawal of CIRP, taking into consideration that, before the constitution of CoC, the Corporate Debtor and Operational Creditor had settled their dues amicably. The NCLAT noted that in a catena of judgements it was observed that, the NCLAT and the NCLT had consistently exercised inherent powers conferred upon them to allow withdrawal, on a case-to-case basis in view of the settlement reached prior to formation of a

CoC.

NCLAT relied extensively on the observations made in Swiss Ribbons (supra) wherein it was noted that, once IBC gets triggered on admission of a petition filed by a creditor(s), by the NCLT, the proceeding before the NCLT, being a collective proceeding, would be a proceeding *in rem*. Therefore, at any stage where the CoC would not have been constituted, a party could approach and consult NCLT directly, which may, in exercise of its inherent powers under Rule 11 of NCLT Rules, allow or disallow an application for withdrawal or settlement which will be decided after hearing all the parties concerned and considering all relevant factors on the facts of each case. NCLAT noted that, in the case of ***Brilliant Alloys Private Limited v. Mr. S. Rajagopal and Others [SLP (Civil) No. 31557/2018],*** it was clarified that Regulation 30-A is not mandatory but is directory for the simple reason that on the facts of a given case, an application for withdrawal may be allowed in exceptional cases even after issuing the invitation for expression of interest under Regulation 36-A. Further the NCLAT rejected the contention that the application for withdrawal, filed, prior to constitution of CoC ought to be mandatorily dealt with the provisions under the Regulation 30-A(1)(a) of CIRP Regulations.

The NCLAT further observed that it is a well-settled proposition of law that, substantive law takes precedence over a regulation and Section 12-A of the IBC clearly refers to the withdrawal of an application under Sections 7, 9 or 10 of the IBC after the constitution of the CoC. The NCLAT noted that, the main thrust against the provision of Section 12-A is the fact that 90% of a CoC would have to allow withdrawal. The withdrawal shall be a consequence of all financial creditors contemplating and deciding together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into with a corporate debtor.

The NCLAT noted with regard to the intervenors applications that it was not the case of the intervenors that demand notices under Section 8 of the IBC were pending. Rather their contention was that, the Corporate Debtor owed them certain monies/dues. The NCLAT observed that, before constitution of CoC, mere filing of a 'Claim' did not constitute default *per se*. It was only on the basis of the 'Claims' that the CoC was constituted. The NCLAT observed that the prime objective of the IBC is not recovery, but revival of the Corporate Debtor. Further that, after admission of petition under IBC, the NCLT, on a case to case basis can exercise its inherent power under Rule 11 of the NCLT Rules for withdrawal of CIRP, if parties are interested to amicably settle the matter prior to constitution of CoC.

The NCLAT noted that, the communication filed by the Operational Creditor evidenced that all amounts due and payable by the Corporate Debtor, had been paid in full and final satisfaction. The NCLAT proceeded to reiterate that, in the interest of justice, the inherent powers could be exercised by both NCLT and NCLAT and consequentially, they may allow or disallow the application of withdrawal keeping in view the interest of the concerned parties and the facts of each case.

Decision of the NCLAT

The NCLAT proceeded to hold that, in the interest of justice it would exercise the inherent powers and allow withdrawal of CIRP application against the Corporate Debtor in view the interest of the concerned parties. The NCLAT noted that, Regulation 30-A(1)(a) was not applicable to the present case.

The NCLAT allowed the Appeal and set aside the Impugned Order, thereby consequentially also set aside appointment of IRP, moratorium against Corporate Debtor, etc. The NCLAT further directed that, the Corporate

Debtor was released from all the rigours of law and is allowed to function independently through its board of directors with immediate effect.

The intervenor applications filed during the pendency of the Appeal, were dismissed. The NCLAT further held that, the intervenors were free to seek legal remedies available under IBC by filing separate application for admission of CIRP at any stage and that NCLT shall hear the matter, uninfluenced by this Judgement, if any, on merits and proceed in accordance with law.

VA View:

The NCLAT in this Judgement held that Regulation 30A of the CIRP Regulations was not applicable to the instant Appeal. The NCLAT rightly observed that an appeal before NCLAT is essentially a continuation of the original proceeding. Hence a change in law can always be applied in an original or appellate proceeding. The NCLAT noted that IBC envisages the said principle more particularly on account of Section 32 of the IBC which provides that any appeal from an order approving the resolution plan shall be in the manner and on the grounds specified in Section 61(3) of the IBC. The NCLAT held that its inherent powers were sufficient for allowing the withdrawal of CIRP proceedings.

The NCLAT also considered the effect of the pandemic on the 'Hospitality and Tourism Industry' and noted that creditors were free to move an application before the NCLT or they could alternatively approach the Corporate Debtor and reach an amicable settlement for the same.

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