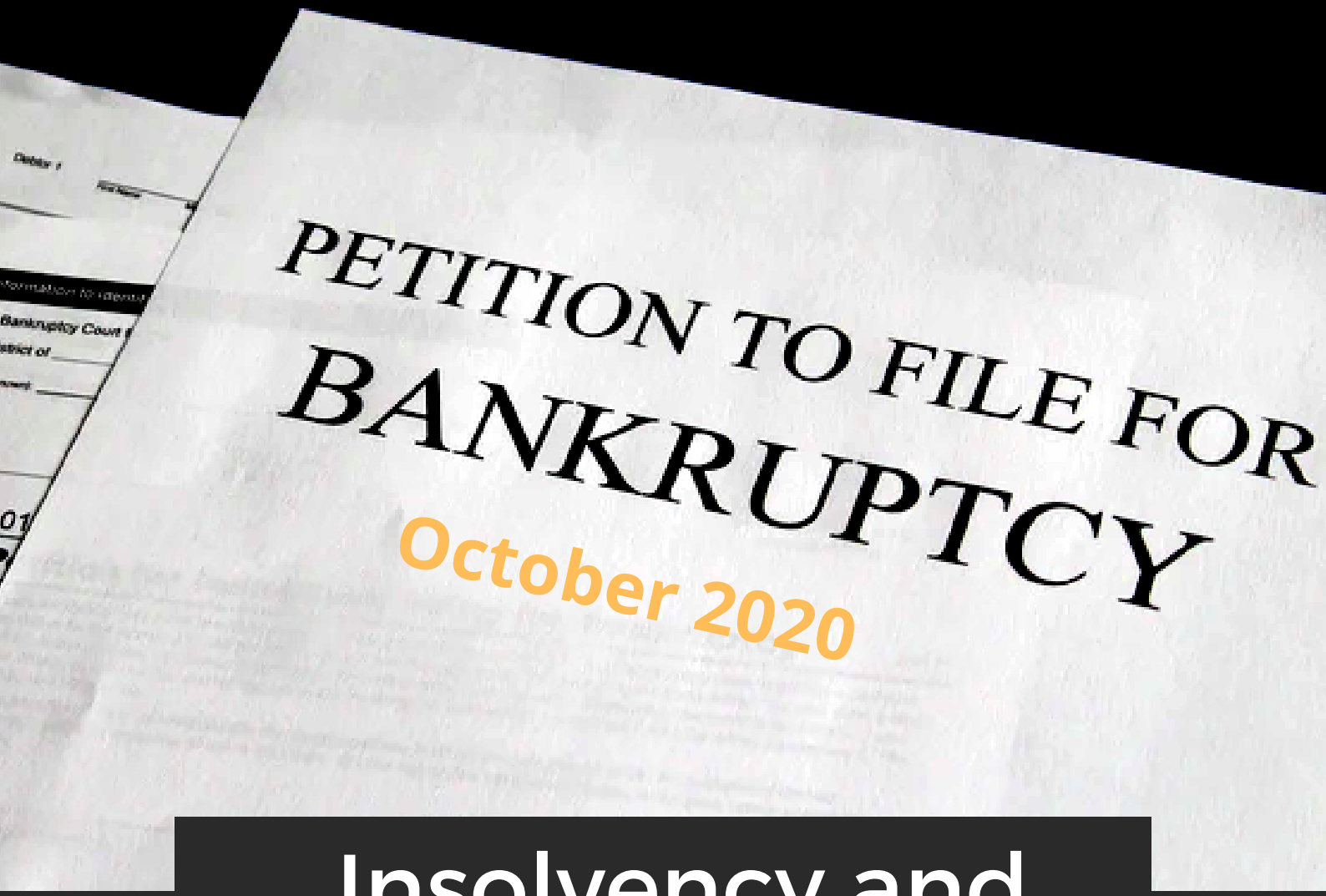

Insolvency and Bankruptcy Code

Quarterly Review of Significant Judgments (July - September)

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The judiciary has rendered numerous path-breaking decisions to complement various amendments to the Insolvency and Bankruptcy Code, 2016 (**IBC**), and clarify the manner in which provisions of the IBC are to be interpreted and applied. We shall discuss here some of the most significant judgments that we have come across in the third quarter of 2020 (July to September 2020), in matters involving provisions of the IBC.

V. Nagarajan v. SKS Ispat and Power Ltd. and Ors.

Company Appeal (AT) (Ins) No.530 & 700 of 2019
National Company Law Appellate Tribunal, New Delhi
Decided On: 13.07.2020

Brief Facts: The present case involves an appeal that emanates from an order passed by the National Company Law Tribunal, Chennai Bench (**NCLT**) whereby the adjudicating authority declined to grant the interim relief about the invocation of a performance bank guarantee given by the bankers, on behalf of the corporate debtor.

The appeal was preferred against an order dated 31.12.2019 and filed before the National Company Law Appellate Tribunal (**NCLAT**) on 28.06.2020. Therefore, the Registry of the NCLAT raised an objection concerning the limitation in the instant matter stating that the appeal was not filed within 30 days of passing of the impugned order under Section 61 of the IBC.

The reason assigned by the appellant for preferring a delayed appeal was that the certified and free copy of impugned order was not issued to him and an unsigned order was uploaded on the NCLT website on 12.03.2020. Therefore, the appellant submitted that the 30 days' time limit was available until 11.04.2020. Thereafter, by the general order of the Hon'ble Supreme Court dated 23.03.2020, the limitation period was extended from 15.03.2020 onwards. Hence, the appellant claimed that the appeal was filed within time.

Held: The NCLAT referred to Section 61 of the IBC to hold that the language of the provision was clear in stating that the tribunal did not have the power to extend the time limit beyond 15 days, in addition to the statutory time limit of 30 days. Even the extension of 15 days would depend upon the satisfaction of the appellate tribunal on being shown a sufficient cause for not filing the appeal within the time limit. ***[1]*** The NCLAT then referred to the decision in ***Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd. [2]*** to reiterate that the strict adherence of the timelines is of the essence to both the triggering process and the insolvency resolution process.

"The tribunal had minimal jurisdiction to extend the time limit of 15 days on satisfaction and sufficient cause only."
-NCLAT

On the facts of the case, the NCLAT observed that appellant's contention that certified and a free copy of the impugned order was not issued to him was unsupported by any evidence. It was also noted that the appellant had failed to file any application for condonation of the delay. Since the appellant did not submit an application showing enough reason for not filing the appeal within time, the NCLAT held that it could not extend the time limit of filing the appeal. The NCLAT added further that the tribunal had minimal jurisdiction to extend the time limit of 15 days on satisfaction and sufficient cause only.

[1] Pr. Director General of Income Tax v. Spartek Ceramics India Ltd., 2018 SCC OnLine NCLAT 289.
[2] Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd., (2018) 1 SCC 353.

Vijay Kumar V Iyer v.
Bharti Airtel Ltd. and Ors.

Company Appeal (AT) (Ins) No.530 & 700 of 2019
National Company Law Appellate Tribunal, New Delhi
Decided On: 13.07.2020

"accounting conventions could not supersede any express provisions of the IBC. Even if there is a contrary provision that a party could take shelter under, the IBC's moratorium mechanism will override it." - NCLAT

Brief Facts: The instant matter involved an appeal under Section 61 of the IBC filed by the resolution professional of corporate debtors, i.e. Dishnet Wireless & Aircel Limited. The appellant challenged the impugned orders in two insolvency petitions passed by the National Company Law Tribunal, Mumbai Bench (**NCLT**) wherein the NCLT permitted to set off certain amount due from Aircel companies to Airtel companies to the tune of approximately 112 Crore Rupees.

The resolution professional contended that the first and the second respondent were obliged to pay a sum of 453 Crore Rupees under the insolvency proceedings. However, the respondents only paid 341 Crore Rupees and illegally detained a sum of approximately 112 Crore Rupees, i.e. the set-off amount. The appellant further submitted that the NCLT allowed the set-off and thereby granted the respondents a preferential payment over other operational creditors. The appellant stated that the impugned order was against the objective of the IBC and Article 14 of the Indian Constitution.

The respondents, on the other hand, stated that they released 341.80 Crore Rupees to Aircel entities and applied the balance amount of 112 Crore Rupees for set off against the dues owed by Aircel companies to Airtel companies. The first and the second respondent submitted that the right of a party to apply set-off was a well-known concept in accounting and was recognised in the context of insolvency laws.

However, the fourth respondent, i.e. the State Bank of India vehemently opposed the set off stating that there was no provision under the IBC or the CIRP regulations that would permit a set-off. The fourth respondent stated that allowing the set-off would be antithetical to the objective of the IBC framework, which is to preserve and maximise the value of the corporate debtor. Therefore, the set-off was challenged to be prejudicial for the interest of the secured creditor.

The moot question before the NCLAT was whether any dues could be set-off during the period of Corporate Insolvency Resolution Process (**CIRP**) when moratorium under Section 14 of the IBC was in operation?

Held: The NCLAT began its analysis by referring to the judgment in ***Indian Overseas Bank v. Mr. Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Ltd. [3]*** wherein it was held that once the moratorium had been declared it was not open to any person including the financial creditor to recover any amount from the account of the corporate debtor nor could any party appropriate any amount towards it dues. Then the NCLAT also referred to the decisions in ***MSTC Ltd. v. Adhunik Metaliks Ltd & Ors***. ***[4]*** and ***Liberty House Group Pvt. Ltd v. State Bank of India & Anr. [5]*** to hold that Section 14 of the IBC would override any other provision contrary to it. Therefore, any amount due to the operational creditor before the date of the admission of the CIRP could not be appropriated under the moratorium period.

The NCLAT then read through Section 238 of the IBC which provided that the provisions of the IBC would override other laws inconsistent to the IBC. Therefore, the NCLAT concluded that accounting conventions could not supersede any express provisions of the IBC. Even if there is a contrary provision that a party could take shelter under, the IBC's moratorium mechanism will override it.

Accordingly, the present appeal was allowed, and the impugned order was set aside. The first and the second respondent were directed to pay whatever amount was set off by them to the Aircel Entities.

[3] Indian Overseas Bank v. Mr. Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Ltd., Company Appeal (AT) (Ins) No. 267 of 2017
[4] MSTC Ltd. v. Adhunik Metaliks Ltd & Ors., Company Appeal (AT) (Ins) No.519 of 2018.
[5] Liberty House Group Pvt. Ltd v. State Bank of India & Anr., Company Appeal (AT) (Ins) No.53 & 54 of 2019.

Brand Realty Services Ltd. v. Sir John Bakeries India Pvt. Ltd.

(IB) 1677(ND)/2019
National Company Law Appellate Tribunal, New Delhi
Decided On: 22.07.2020

"on a conjoint reading of the three definitions of operational debt, debt and default under the IBC, it would be clear that an unpaid instalment under an agreement would not be treated as an operational debt under the IBC."
- NCLAT

Brief Facts: The appellant, i.e. the operational creditor in the instant matter has filed an application against the respondent under Section 9 of the IBC read with Rule 6 of the IBC, 2016 for initiation of the Corporate Insolvency Resolution Process (**CIRP**).

The corporate debtor, i.e. the respondent approached the operational creditor asking for investment and consultancy pertaining to setting up a new retail outlet in a mall. Thereafter, the operational creditor and the corporate debtor entered into an agreement in 2014 which was ratified further in 15.06.2018 vide an Account Settlement Agreement (**Agreement**). As per the Agreement, the corporate debtor agreed to pay an outstanding sum of 33,94,000 Rupees vide post-dated cheques (**PDCs**).

In 2019, when the operational creditor tried to present the PDCs, the bank returned them unpaid due to a 'stop payment' request made by the corporate debtor. The operational creditor attempted to recover the outstanding dues by sending a demand notice on 30.04.2019. The corporate debtor replied to the demand notice on 25.05.2019 outside the stipulated period of 10 days. The operational creditor stated that no part of the claim was time-barred; the cause of action had arisen against the corporate debtor in April 2018. Therefore, aggrieved by the breach of terms of the Agreement, the operational creditor prayed for initiation of CIRP.

The corporate debtor stated that the operational debtor failed to enclose all documents necessary for the disposal of the instant matter. Therefore, in the absence of the crucial documents, the corporate debtor denied any liability. Further, the corporate debtor contended that its accounts were settled and no outstanding dues remained as per a settlement letter (**Letter**) signed by the parties on 19.12.2017. Therefore, given the deficiency in service and presence of a pre-existing dispute between the parties regarding the existence of personal debt, the instant application under Section 9 of the IBC could not be admitted.

Held: The NCLAT noted that the structure of the Agreement was such that the corporate debtor had agreed to pay on an instalment basis a stipulated sum of 33,94,000 Rupees. In order to initiate the CIRP, the NCLAT held that the operational creditor had to prove that the Agreement fell within the ambit of an operational debt as defined under Section 5(21) or debt simpliciter as under Section 3(11) of the IBC. Further, the operational creditor was required to show that there was a default as defined under Section 3(12) in relation to the debt. However, the NCLAT noted that on a conjoint reading of the three definitions of operational debt, debt and default under the IBC, it would be clear that an unpaid instalment under an agreement would not be treated as an operational debt under the IBC. The NCLAT relied upon the decision in ***Delhi Control Devices (P) Ltd. v. M/s Fedders Electric and Engineering Ltd. [6]*** wherein it was ruled that unpaid instalments under a settlement agreement shall not be considered as debts within the meaning and ambit of Section 5(21) of the IBC. Therefore, the NCLAT concluded that the failure or breach of the Agreement in the facts of the present case could not be a ground to trigger CIRP against the corporate debtor under the relevant provisions of the IBC and the 'remedy for the applicant shall lie somewhere else but not before the adjudicating authority'. Accordingly, the application was dismissed.

[6] Delhi Control Devices(P) Ltd. v. Fedders Electric and Engineering Ltd. Company Petition No. (IB)343/ALD/2018.

Kotak Investment Advisors Limited v. Krishna Chamadia and Ors.

Company Appeal (AT) (Insolvency) Nos. 344 - 345 of 2020
National Company Law Appellate Tribunal, New Delhi
Decided On: 05.08.2020

Whether the resolution professional was authorised to accept the resolution plans after the expiry of the deadlines for submission?

Brief Facts: The facts of the present case are such that the appellant had challenged two orders passed by the National Company Law Tribunal, Mumbai Bench (**NCLT**) whereby the NCLT had rejected objections against alleged illegalities committed in Corporate Insolvency Resolution Process (**CIRP**) and approved the resolution plan.

Pursuant to the initiation of the CIRP in the matter of the corporate debtor, the resolution professional invited Expressions of Interest (**EOI**) from interested resolution applicants. The resolution professional, post receiving the EOIs, consulted the Committee of Creditors (**CoC**) after which a process memorandum was issued calling for the resolution plans before the last date of submission.

Admittedly, two resolution applicants had filed their resolution plans within the deadline of submission. The CoC opened both the resolution plans and began its discussions upon the same. However, in addition to the aforementioned resolution plans, two more resolution plans were accepted by the resolution professional after the expiry of the deadline for submission. This was done without obtaining a CoC resolution to extend the deadline and issuance of a fresh notice inviting other potential resolution applicants. Interestingly, one of the resolution plans which was submitted belatedly was approved by the CoC as the successful plan, and the resolution professional proceeded to file an application with the NCLT for approval under Section 31 of the IBC.

Therefore, the appellant being the unsuccessful applicant, challenged the decision of the resolution professional in the acceptance of two resolution plans that had been submitted after the expiry of the deadline of submission. The NCLT rejected the application of the appellant by relying upon the case in ***K Sashidhar v. Indian Overseas Bank & Ors. [7]*** wherein it was held that the commercial decision of the CoC for approval of resolution plan is non-justiciable and hence, is required to be sanctioned by the adjudicating authority. Moreover, the NCLT observed that it was a case where fair opportunity was granted to all resolution applicants, and the most attractive plan was sanctioned for approval by the adjudicating authority. The order of the NCLT refusing to interfere with the decision of the CoC was challenged before the NCLAT. Hence, the present case.

Held: The National Company Law Appellate Tribunal (**NCLAT**) noted that one of the issues that had cropped up in the instant matter was whether the resolution professional was authorised to accept the resolution plans after the expiry of the deadlines for submission.

The NCLAT referred to the decision of the Hon'ble Supreme Court in ***Essar Steel India Limited v. Satish Kumar Gupta and Others [8]*** to reiterate that the CoC indeed, had the power to exercise its commercial wisdom in approval or rejection of the resolution plan. However, the same could not mean that the resolution professional, whether with the approval of CoC or without that or in pursuance of process memorandum under the guise of maximisation of value, was empowered to adopt a procedure in the conduct of CIRP which was, ab-initio illegal, arbitrary and against the principles of natural justice.

The NCLAT observed further that it failed to understand as to why the resolution professional had deviated from the procedure set out for the selection of resolution plans. Therefore, the NCLAT concluded that the act of the resolution professional to accept the belated resolution plans could not be justified by any means and was a blatant misuse of the authority vested in the resolution professional.

The NCLAT further clarified that an approved resolution plan could be challenged before the adjudicating authority on limited grounds of interference referred in Section 30(2) or in an appeal under the grounds mentioned in Section 31 of the IBC which included material irregularity in exercise of powers of the resolution professional.

Therefore, the appeal was allowed, and the CoC was directed to take a fresh decision on the resolution plans submitted within the stipulated deadline.

[7] K Sashidhar v. Indian Overseas Bank & Ors., Civil Appeal No. 10673 of 2018.
[8] Essar Steel India Limited v. Satish Kumar Gupta and Others, Civil Appeal No. 8766-67 of 2019.

Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.

Civil Appeal No. 6347 of 2019
Supreme Court of India
Decided On: 14.08.2020

Brief Facts: The instant matter involves an appeal under Section 62 of the IBC which is directed against the judgment and order of the National Company Law Appellate Tribunal (**NCLAT**) whereby the NCLAT rejected the contention that the application made by the second respondent under Section 7 of the IBC was barred by limitation.

The second respondent had filed an application under Section 7 of the IBC against the corporate debtor before National Company Law Tribunal, Mumbai (**NCLT**), on or about 21.03.2018 for the initiation of Corporate Insolvency Resolution Process (**CIRP**) against the first respondent.

The NCLT by an order dated 09.08.2018, admitted the application of the second respondent and appointed an Interim Resolution Professional (**IRP**). The order of the NCLT was challenged before the NCLAT and ultimately before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court of India observed that the matter was summarily dismissed by the NCLAT and hence, remanded the matter back to the NCLAT.

Before the NCLAT, it was contended that the claim of the financial creditor, i.e. the second respondent was barred by limitation under Article 137 of the Limitation Act, 1963 (**Limitation Act**) since the default was committed on 08.07.2011 whereas the application was filed on 21.03.2018. The NCLAT, rejecting this argument, held that the application of the second respondent was not time-barred on two grounds:

1. Firstly, the right to apply under Section 7 of the IBC accrued on 01.12.2016 when the IBC came into force and hence, the application of the second respondent filed in 2018 is not barred by limitation.
2. Secondly, the corporate debtor had provided mortgage security in the instant matter. As per Article 61(b) of the Limitation Act, the limitation period in the instant case would have extended up to 12 years.

Aggrieved by order of the NCLAT in favour of the respondent, the instant appeal has been preferred by the appellant, who is the ex-director of the first respondent corporation. The moot question before the Hon'ble Supreme Court was whether the application made by the second respondent under Section 7 of the IBC was within limitation.

The appellant before the Hon'ble Supreme Court contended that the limitation period for an application under Section 7 of the IBC was three years as per Article 137 of the Limitation Act and Article 61(b) is not attracted. The respondent contended that the debt had been admitted in the balance sheet of the corporate debtor since the year 2011 until 2017 and as such, Section 18 of the Limitation Act provided for a fresh period of limitation to be computed where a written acknowledgement of the debt was made available.

Held: The Hon'ble Supreme Court at first, in its analysis, discussed a catena of decisions ***[9]*** to present the following principles:

1. that the IBC is beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation;
2. that CIRP is not intended to be adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor;
3. that intention of the IBC is not to give a new lease of life to time-barred debts;
4. that the period of limitation for an application seeking initiation of CIRP under Section 7 of the IBC is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when the right to apply accrues;
5. that the trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, that is to say, that the right to apply under the IBC accrues on the date when default occurs;
6. that default referred to in the IBC is that of actual non-payment by the corporate debtor when a debt has become due and payable; and
7. that if the default had occurred over three years before the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; and
8. an application under Section 7 of the IBC is not for enforcement of mortgage liability, and Article 62 of the Limitation Act does not apply to this application.

On whether Section 18 of the Limitation Act could be applied to the present case, the respondent relied upon the decision in ***Jignesh Shah [10]***, to argue that the respondent's application under Section 7 of the IBC was not barred by limitation on ground of written acknowledgement of debt. The Hon'ble Supreme Court held that the respondent's arguments based upon paragraph 21 of the Jignesh Shah judgment were untenable. On facts as well, the Hon'ble Supreme Court held that Section 18 of the Limitation Act would not be attracted since the Section 7 application of the respondent was bereft of any pleadings in this respect. All that was pleaded was that the date of default was 08.07.2011 with no mention of any other date of default and date of acknowledgement of debt.

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[9] B.K. Educational Services Private Limited v. Parag Gupta and Associates (Civil Appeal No.23988 of 2017); Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors. (Writ Petition (Civil) No. 99 of 2018); K. Sashidhar v. Indian Overseas Bank & Ors. (Civil Appeal No.10673 of 2018); Jignesh Shah & Anr. v. Union of India & Anr. (Writ Petition (Civil) No.455 of 2019); Vashdeo R Bhojwani v. Abhyudaya Co-Operative Bank Ltd & Anr. (Civil Appeal No. 11020 of 2018); Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd.& Anr. (Civil Appeal No. 4952 of 2019); Sagar Sharma & Anr. v. Phoenix ARC Pvt. Ltd. & Anr. (Civil Appeal No. 7673 of 2019).
[10] Jignesh Shah & Anr. v. Union of India & Anr., (Writ Petition (Civil) No.455 of 2019).

Sushil Ansal v.
Ashok Tripathi and Ors.

Company Appeal (AT) (Insolvency) No. 452 of 2020
National Company Law Appellate Tribunal, New Delhi
Decided On: 14.08.2020

Brief Facts: The first and the second respondent are homebuyers who had jointly booked a unit in a project developed by the corporate debtor. In September 2014, the parties signed a Builder Buyer Agreement (**Agreements**) pursuant to their bookings. The corporate debtor had as per the terms of the Agreement undertaken to complete the project within two years from the date of commencement of construction. However, the corporate debtor failed to deliver possession of the unit within two years. Even after five years having passed, the corporate debtor could not complete the construction of the promised units in the project, nor did it refund the amount to the allottees. Therefore, the first and the second respondent approached Uttar Pradesh Real Estate Regulatory Authority (**RERA**). The RERA decided the matter in favour of the respondents and granted a decree for an amount of 73,35,686.43 Rupees. Further, a recovery certificate was also issued by RERA in favour of the respondents against the corporate debtor.

The respondents then filed an application under Section 7 of the IBC before the National Company Law Tribunal, Delhi (**NCLT**). Consequently, the NCLT allowed the appointment of an interim resolution professional and the corporate debtor was placed under moratorium. Aggrieved by the decision of the NCLT, the director of the corporate debtor challenged the order before the National Company Law Appellate Tribunal (**NCLAT**).

During the pendency of the appeal before the NCLAT, the two respondents filed a joint application before the NCLAT for the withdrawal of the application filed under Section 7 of the IBC based on the settlement deed that had been executed amongst the parties. The respondents took the umbrage of Rule 11 of the NCLAT Rules, 2016 (NCLAT Rules) to withdraw their application filed under Section 7 of the IBC.

Therefore, the issues that were drawn for the consideration of the NCLAT were as follows:

1. Firstly, whether the instant case was fit for invoking Rule 11 of the NCLAT Rules to allow the parties to settle the dispute?
2. Secondly, whether the application filed by the homebuyers under Section 7 of the I&B Code was maintainable?

"a decree-holder would not be classified as a financial creditor unless the debt was disbursed against a time value of money."
- NCLAT

Held: The NCLAT on whether the respondents had rightly invoked Rule 11 of the NCLAT Rules held that the corporate debtor was permitted to exit from the Corporate Insolvency Resolution Process (**CIRP**) until the post-admission stage before the constitution of the committee of creditors (**CoC**). The NCLAT further stated that a party was permitted to withdraw an application under Section 7 of the IBC on the ground of a settlement arrived at amongst the parties. However, it was held that such power could be exercised only before the CoC was constituted. The NCLAT also noted that the exercise of powers vested under Rule 11 of the NCLAT Rules was discretionary and bound by considerations of preventing abuse of process of court and meeting the ends of justice. Therefore, on the facts of the case, it was observed that allowing the settlement would be detrimental to the interest of more than two hundred allottees who made their claim under the instant insolvency proceeding.

On whether the application under Section 7 of the IBC was maintainable, it was held that a decree-holder was undoubtedly covered within the definition of a creditor under Section 3(10) of the IBC. However, the NCLAT clarified that a decree-holder would not be classified as a financial creditor unless the debt was disbursed against a time value of money. Hence, the NCLAT observed the decree-holder respondents, although included in the definition of creditor, did not fall within the definition of financial creditors. The NCLAT noted that it was conscious of the fact that the setting aside of the impugned order would derail the entire resolution process. Nevertheless, since the very edifice was gone, the process could not continue and had to collapse.

In view of the above-mentioned findings, the NCLAT set aside all orders of the NCLT while allowing the appeal.

Radha Exports (India) Pvt. Limited v. K.P. Jayaram and Ors.

Civil Appeal No. 7474 of 2019
Supreme Court of India
Decided On: 28.08.2020

"It is for the respondents to show while invoking the Corporate Insolvency Resolution Process (CIRP) that there was a legally recoverable debt which was not barred by limitation."

Brief Facts: The instant matter involves an appeal against a judgment and an order of the National Company Law Appellate Tribunal (**NCLAT**) allowing a company appeal against an order passed by the National Company Law Tribunal, Chennai Bench (**NCLT**) rejecting the application filed by the respondents under Section 7 of the IBC. The NCLT denied the respondents any relief on the ground that their appeal was barred by limitation.

The respondents submit that they had advanced a sum of money to a proprietorship concern for its business. The loan was an unsecured debt and interest-free. Thereafter, the appellant was incorporated as a private company which took over the proprietorship concern along with its assets and liabilities. The appellant was informed about the outstanding loan against the respondent. The respondent had requested the appellant corporation to convert a portion of the outstanding dues into share application for issuance of shares in the appellant corporation in the name of the second respondent. The appellant contends that the loan liability against the respondent stood liquidated entirely by March 2006. Thereafter, in October 2007, the second respondent resigned from the board of appellant corporation and requested it to issue share application money as a personal loan in favour of one of the promoters of the appellant by the issue of shares in his favour. The shares of the second respondent were therefore issued in a personal loan to the promoter in the year 2008.

However, in 2012, the appellant was served a legal notice wherein an amount was claimed towards the loan liability. The appellant refuted any outstanding dues to the respondents. Accordingly, proceedings for winding up were initiated against the appellant on the grounds of alleged forgery and fraud. The winding-up petition was however declined on the ground that cases involving forgery and fraud were handled through a regular suit. Thereafter, the respondent filed a petition under Section 7 of the IBC. The NCLT meticulously took note of all details and arguments and dismissed respondents petition under Section 7 of the IBC holding that the respondents were not financial creditors of the appellant. The NCLT stated further that in any case, the petition of the respondent was hopelessly barred by limitation. The respondents then challenged the order of the NCLT dismissing the petition filed under Section 7 of the IBC. The NCLAT by the impugned judgment and order allowed the respondents appeal and set aside the order of the NCLT. Hence, the present matter.

Held: The Hon'ble Supreme Court, in its analysis, referred to its judgment in ***B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates [11]*** wherein it was held that the Limitation Act, 1963 (Limitation Act) was applicable on the applications filed under Section 7 and 9 of the IBC. The right to sue would accrue when the default occurred. If the default had occurred three years before the date of filing the application, the application would be barred under Article 137 of the Limitation Act. The Hon'ble Supreme Court also stated that the decision in B.K. Educational Services was reiterated in ***Vashdeo R. Bhojwani v. Abhyudaya Co-operative Bank Ltd. [12]***

Therefore, on the facts of the case, the Hon'ble Supreme Court held that it was for the respondents to show while invoking the Corporate Insolvency Resolution Process (**CIRP**) that there was a legally recoverable debt which was not barred by limitation. It was held that the respondents failed to show that the debt was not barred by limitation. The facts showed that the last loan was extended in the year 2004-2005. Thus, the NCLT rightly refused to admit the application under Section 7 of the IBC. The Hon'ble Supreme Court held that the appellate authority made a patent error in reversing the decision of the NCLT.

The Hon'ble Supreme Court further clarified that even otherwise, the application under Section 7 of the IBC was not maintainable since there was no financial debt in existence. The language under Section 5(8) of the IBC made it clear that the payment received for shares, duly issued to a third party at the request of the payee as evident from official records, could not be termed a debt, not to speak of financial debt. Therefore, the appeal was allowed.

[11] B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates, (2019) 11 SCC 633.
[12] Vashdeo R. Bhojwani v. Abhyudaya Co-operative Bank Ltd., (2019) 9 SCC 158.

Sandip Kumar Bajaj and Ors. v. State Bank of India and Ors.

I.A. No. G.A. 1 of 2020 (Old G.A. 1062 of 2020) and W.P.O. 236 of 2020
High Court of Calcutta
Decided On: 15.09.2020

Whether the corporate debtor and the petitioners could be subjected to proceedings for identification of wilful defaulters under the RBI Circular in the face of ongoing CIRP under the IBC?

Brief Facts: The present matter involves a writ petition challenging a Show Cause Notice (**Notice**) issued by the respondent, i.e. the State Bank of India, to the petitioners whereby the petitioners were called upon to explain as to why they should not be included in the list of wilful defaulters under the Reserve Bank of India (**RBI**) guidelines namely the RBI Master Circular on Wilful Defaulters, 2015 (**RBI Circular**).

The petitioners are erstwhile promoters or directors of the corporate debtor presently undergoing a Corporate Insolvency Resolution Process (**CIRP**) under the IBC. The petitioners contend that the because of a moratorium declared under Section 14 of the IBC, the proceedings under RBI Circular for being declared as wilful defaulters should be stayed. The petitioners also contend that the impugned Notice is bad in law since it was not issued by a committee which was empowered to do so under the RBI Circular.

The respondents to the contrary relied upon the decision in ***Union Bank of India v. Sudhir Kumar Patodia/Pawan Kumar Patodia [13]*** to contend that the even if the power to issue a show-cause notice was delegated, the notice itself would not be invalidated. The respondents further pointed out that the petitioners did not plead any prejudice consequent to the issue of the impugned Notice, and therefore the challenge must fail.

Hence, there were two moot questions before the High Court of Calcutta (**High Court**) -

1. Firstly, whether the corporate debtor and the petitioners could be subjected to proceedings for identification of wilful defaulters under the RBI Circular in the face of ongoing CIRP under the IBC?
2. Secondly, whether the impugned Notice was valid?

Held: The High Court at the outset, examined the scheme of the RBI Circular and read through Section 14 of the IBC. The High Court observed that it was clear from Section 14(3)(b) of the IBC that the prohibition on institution or continuation of suits and other proceedings against the corporate debtor did not extend to surety. The High Court then went onto examine the contents of Clause 3 of the RBI Circular, which discussed the composition of the committee entrusted with the task of first identifying and then examining the evidence of wilful default. The High Court noted that the contention of the petitioners was that composition of the committee of the respondent contravened with Clause 3(a) of the RBI Circular.

However, the High Court clarified that the RBI permitted the departure from the composition as recommended under Clause 3. Even otherwise, the High Court took judicial notice of the fact that there were no Executive Directors on the board of the State Bank of India at the time, which was comprised of a Chairman, Managing Directors and Directors. Following what was set out in the judgment of ***Secretary, Ministry of Defence v. Prabhash Chandra Mirdha, [14]*** the High Court reiterated that the Notice did not give rise to a cause of action unless a strong case of abuse of process was made out. Hence, the petition was dismissed.

[13] Union Bank of India v. Sudhir Kumar Patodia/Pawan Kumar Patodia, CAN 5340 of 2019 in MAT 787 of 2019.
[14] Secretary, Ministry of Defence v. Prabhash Chandra Mirdha, (2012)11 SCC 565.

Deepakk Kumar v.
M/s Phoenix ARC Ltd. and Anr.

Review Application No. 9 of 2020 in Company Appeal (AT) (Insolvency) No. 848 of 2019
National Company Law Appellate Tribunal, New Delhi
Decided On: 17.09.2020

सत्यमेव जयते

NCLAT
(National Company Law Appellate Tribunal)

"no error could be said to be an error 'on the face of the record' if it was not self-evident and required an examination or argument to establish it."

Brief Facts: The instant matter involves a review application under the Section 420(2) of the Companies Act, 2013 read with Rule 11 of the NCLAT Rules, 2016 seeking review of the judgment of the National Company Law Appellate Tribunal (**NCLAT**) for correction of an error apparent on the face of the record.

The appellant in the instant matter contends that the first respondent had filed an application under Section 7 of the IBC before the National Company Law Tribunal (**NCLT**) on 05.09.2018 after an admitted gap of five years. The appellant further stated that before the NCLT in Form No. 1 filed by the first respondent, the date of default was stated to be 01.11.2012. Therefore, the appellant contended that there was no scope for interpretation in respect of the date of default given the law laid in ***Vasdeo R. Bhojwani v. Abhyudya Cooperative Bank Ltd. & Anr. [15]***

The appellant further stated that the application of the respondent filed under Section 7 of the IBC was held to be within the period of limitation by the NCLT. To arrive at this conclusion, the NCLT relied upon the 'acknowledgement' dated 09.06.2016 with a new loan agreement signed between the corporate debtor and its directors, including the appellant. The appellant contended that signing a new loan agreement or an assignment agreement beyond the period of three years from the date of default would not save a time-barred loan. The appellant further relied upon the judgment of the Hon'ble Supreme Court in ***Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) and Anr. [16]*** to contend that the NCLT should have considered the contents of Form No. 1. The appellant also stated that there was nothing in the record to show that anything transpired between November 2012 and October 2015, i.e. within three years. The appellant relied upon the decision in ***Assistant Commissioner, Income Tax, Rajkot v. Saurashtra Kutch Stock Exchange Ltd. [17]*** to contend that the NCLAT in the instant matter was not required to travel beyond the record, to review the matter. Therefore, the moot question in the present matter was whether the NCLAT could exercise the review jurisdiction given the facts in the instant matter.

Held: The NCLAT relied upon a few decisions of the Hon'ble Supreme Court ***[18]*** to hold that no error could be said to be an error 'on the face of the record' if it was not self-evident and required an examination or argument to establish it. The term 'review' judicially and literally means re-examination or reconsideration. Therefore, under the guise of a review, the adjudicating authority cannot rehear the parties both on facts and law. If two views were possible on the point involved, the same would not be a ground for review as per the decision of the Hon'ble Supreme Court in ***Hari Nagar Sugar Mills Ltd. and Anr. v. State of Bihar & Ors. [19]*** The NCLAT then referred to the provisions that the appellant sought shelter under. It was held that a mere perusal of NCLAT Rules, 2016 would make it clear that there is no express provision for review and further the appellant could not rely upon Rule 11 of the NCLAT Rules, 2016 which merely stated the inherent powers of the appellate authority.

The NCLAT then held that the appellant could not seek umbrage under Section 420(2) of the Companies Act, 2013 for filing the 'Review Application' on the purported ground of rectifying any mistake apparent from the record, within two years from the date of order passed. ***[20]*** The NCLAT concluded that a rehearing of the NCLAT judgement was impermissible in law and the appropriate course of action open to the appellant would be to approach the Hon'ble Supreme Court of India.

[15] Vasdeo R. Bhojwani v. Abhyudya Cooperative Bank Ltd. & Anr., Civil Appeal No. 11020 of 2018 reported in 2019.
[16] Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) and Anr., Civil Appeal No. 4952 of 2019.
[17] Assistant Commissioner, Income Tax, Rajkot v. Saurashtra Kutch Stock Exchange Ltd., 2008 14 SCC 171.
[18] Delhi Administration v. Gurdip Singh AIR 2000 SC 3737; M.A. Murthy v. State of Karnataka & Ors 2003 7 SCC 517.
[19] Hari Nagar Sugar Mills Ltd. and Anr. v. State of Bihar & Ors., 2006 1 SCC 509.
[20] M Gadiya v. M.K. Sewak AIR 1977 Mad. 140.

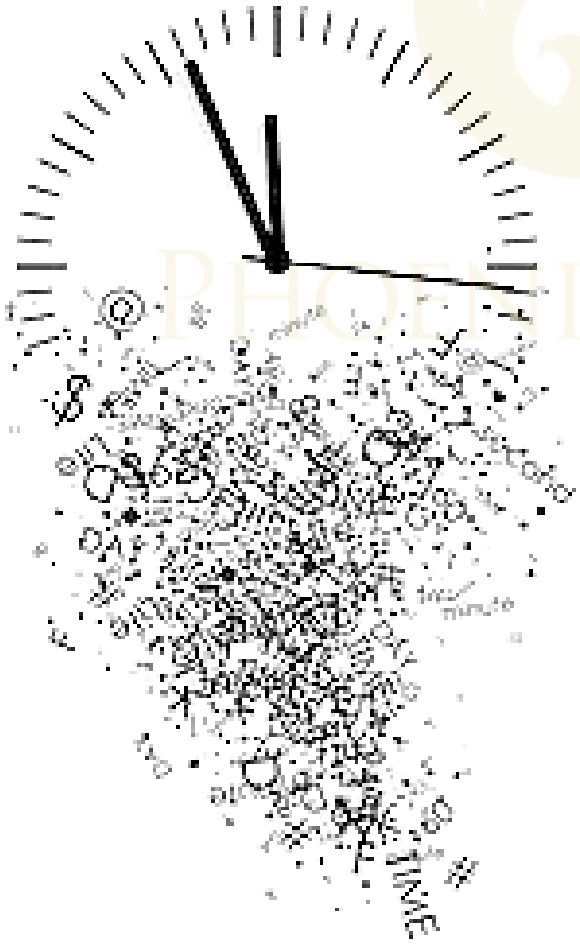
Bishal Jaiswal v. Asset Reconstruction Company (India) Ltd. and Others.

Company Appeal (AT) (Insolvency) No. 385 of 2020
National Company Law Appellate Tribunal, New Delhi
Decided On: 25.09.2020

Brief Facts: The facts of the case are that the corporate debtor had availed a loan from the consortium lenders for setting up a coal-based power plant. The corporate debtor had availed loans aggregating to a total of 2175 Crore Rupees for the first phase of the project and 2387 Crore Rupees for the second phase of setting up the power plant. The corporate debtor failed to repay its dues; therefore, the financial creditor filed an application for the initiation of the Corporate Insolvency Resolution Process (**CIRP**) under Section 7 of the IBC.

The main contention of the appellant is that the State Bank of India, the predecessor in interest of the financial creditor had declared the accounts of the corporate debtor as Non-Performing Assets (**NPA**) on 28.02.2014. The application under Section 7 of the IBC was filed in December 2018, i.e. after a delay of almost five years. Therefore, the appellant submitted that the application of the respondent was barred by limitation.

The NCLT had failed to appreciate that the balance sheet produced by the financial creditor did not hold the appellant liable, as there was no categorical mention of the name of the financial creditor therein. The appellant relied upon the decision in the case of ***V. Padma Kumar v. Stressed Assets Stabilization Fund (SASF) & Anr. [21]*** to contend that the books of accounts were required to be prepared under the obligation cast under Section 92 of the Companies Act, 2013. Therefore, it could not amount to an acknowledgement for Section 18 of the Limitation Act, 1963 (**Limitation Act**). The acknowledgement to extend the period of limitation should be voluntary and cannot be given under the compulsion of law or with the threat of any penalty or punishment.



The acknowledgement to extend the period of limitation should be voluntary and cannot be given under the compulsion of law or with the threat of any penalty or punishment.
- NCLAT

[21] V. Padma Kumar v. Stressed Assets Stabilization Fund & Anr., Company Appeal (AT) (Ins) No. 57 of 2020.

Held: The NCLAT at the outset, relied upon the decision laid in ***Babulal Vardharji Gurjer v. Veer Gurjer Aluminium Industries Pvt. Ltd. & Anr. [22]*** to state that it was not convinced as to why Section 18 of the Limitation Act would not apply onto insolvency cases. Thereafter, the NCLAT stated that the decision in V. Padmakumar required reconsideration for the following reasons:

I. There is a consistent view of the Hon'ble Supreme Court and High Courts of Allahabad, Calcutta, Delhi, Karnataka, Kerala and Telangana that the entries in the balance sheet of the company could be treated as an acknowledgement of debt for Section 18 of Limitation Act, 1963. The majority view in V. Padmakumar's case was, therefore, just contrary to the settled law.

II. In V. Padamakumar's case, the minority view was in the line of settled law that balance sheet of the company, be treated as an acknowledgement of debt for the purpose of Section 18 of the Limitation Act. In the majority judgment, no reasons were assigned for disagreement with this view.

III. In support of majority Judgment in V. Padamakumar's case, none of the precedents were cited before the NCLAT in the instant matter.

IV. In V. Padamakumar's case, it was discussed that the balance sheet of the company is prepared under Section 92 of the Companies Act, 2013 (Companies Act) and filing of balance sheet/annual return being mandatory under Section 92(4) of the Companies Act, 2013, failing of which attracted a penal action under Section 92(5) and (6) of the Companies Act.

In view of the NCLAT in the present case, the balance sheet was not an annual return but was a financial statement. A financial statement was defined under Section 2(40) of the Companies Act, 2013.

V. In V. Padamakumar's case, it was held that the balance sheet was required to be prepared under the obligation cast under Section 92 of the Companies Act, 2013. Therefore, it could not amount to an acknowledgement for Section 18 of the Limitation Act, 1963. The acknowledgement should be voluntary and cannot be given under compulsion of law or with the threat of any penalty or punishment. Hon'ble Calcutta High Court in the case of ***Bengal Silk Mills Co v. Ismail Golam Hossain Ariff [23]*** and High Court of Delhi in the case of ***South Asia Industries Pvt. Ltd v. Krishna Shamsher Jung Bahadur Rana [24]*** held that merely on the ground that the balance sheet of the company is prepared under the compulsion of law or in the discharge of statutory duty, it could not be held that the balance sheet of the company would not amount to an acknowledgement of liability.

VI. The balance sheet is a material document attached with a sanctity that must be submitted to Registrar of Companies and is used for obtaining a business loan or investments. Relevant provisions concerning the balance sheet of the company provided in Sections 129, 130, 131, 134, 137, 143 and 397 of the Companies Act. Section 130 and 131 provides that a company cannot reopen its books of account and financial statement without the order made by the court of competent jurisdiction or the tribunal. Directors of the company after making judgments and estimates that are reasonable and prudent cannot resile without permission of Tribunal.

VII. Section 397 of the Companies Act, provides that the documents filed for the purpose of Companies Act and rules made thereunder by a company with the registrar shall be admissible in any proceedings thereunder. Without proof or production of original as evidence of any contents of the original or of any fact stated therein of which direct evidence is admissible.

For the reasons mentioned above, the three-member bench of the NCLAT referred the decision of the five-member bench in the V. Padmakumar decision for reconsideration. On the factual front, the adjudicating authority did not accept the contention that the application for initiation of the CIRP was time-barred, as the debt stood acknowledged by the entries in the books of accounts. Hence, the right to sue stood extended in terms of Section 18 of the Limitation Act.

PHOENIX LEGAL

[22] Babulal Vardharji Gurjer v. Veer Gurjer Aluminium Industries Pvt. Ltd. & Anr., (2020) SCC Online SC 647.
[23] Bengal Silk Mills Co v. Ismail Golam Hossain Ariff, AIR 1962 Cal 115.
[24] South Asia Industries Pvt. Ltd v. Krishna Shamsher Jung Bahadur Rana, 1972 SCC OnLine Del 185: ILR (1972) 2 Del 712.