IBC Case Laws

Supreme Court of India

Vallal Rck Vs. M/S Siva Industries and Holdings Limited and Others. Civil Appeal No. 1811-1812 of 2022, Date of Judgment: June 03, 2022

The Apex Court Emphasized the Need for Minimal Judicial Interference by the NCLAT and NCLT in The Framework of IBC.

Facts of the Case

These appeals were filed by appellant against the judgment of the NCLAT-Chennai Bench, whereby it dismissed the appeals filed by the appellant, challenging the two orders passed by the NCLT – Chennai, which rejected the application filed by the Resolution Professional 'RP' under Section 12A of IBC, 2016 read with Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, for withdrawal of the application filed under Section 7 of the IBC in view of the settlement plan submitted by the appellant. The appellant also challenged the order passed by the NCLAT whereby the NCLAT had dismissed the appeal of the appellant against the order passed by the NCLT directing initiation of liquidation proceedings in respect of M/s Siva Industries and Holdings Limited (Corporate Debtor 'CD').

The facts of the case are that IDBI Bank had filed an application under Section 7 of the IBC seeking initiation of CIRP against the CD. After the CIRP process was initiated, the RP presented a resolution plan before the CoC which was not approved as it did not receive 66% votes and then the RP filed an application for initiating liquidation. Subsequently, the Appellant filed a settlement application under Section 60(5) IBC to offer a one-time settlement plan. Thereafter, the CoC considered and approved the Settlement plan. Consequently, the RP filed an application seeking withdrawal of CIRP. However, the NCLT rejected the said application stating that the Settlement Plan was only a Business Restructuring Plan and initiated the liquidation process.

The main question for consideration in the present appeals was as to whether the NCLT or NCLAT can sit in an appeal over the commercial wisdom of the Committee of Creditors 'CoC' or not.

Supreme Court's Observations

The Apex Court referred to Section 12 A of the IBC, 2016, which deals with withdrawal of applications admitted under Section 7, 9 or 10, the Apex Court noted that the provision was inserted by way of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 after much deliberation by the Insolvency Law Committee. The Committee had recommended that an exit should be allowed provided the CoC approves it by 90% voting share.

The Apex Court observed that the recommendation was made as the Committee reckoned that the intent of the IBC is to discourage individual actions for enforcement and settlement. In the light of the same, it had opined that the settlement may be reached amongst all creditors and the debtor, for the purpose of a withdrawal to be granted. Pursuant to the insertion of Section 12A in the IBC, Regulation 30A was added to the Regulations, 2016 which laid down the detailed procedure for withdrawal of application. It further noted that in *Swiss Ribbons Private Limited and Anr. Vs. Union of India and Ors*., validity of Section 12A was upheld. Moreover, the Apex Court in its various judgments had already held that commercial wisdom of CoC is not to be interfered with by NCLT and NCLAT. Further the Court held that, in this case the proceedings of the meetings of CoC clearly showed that there were wide deliberations amongst CoC members while considering the settlement plan as submitted by the appellant and suitable amendments were also made in the same. Subsequently the plan was approved by 94.23% votes.

Order

The Apex Court allowed the present appeals and quashed and set aside the impugned judgment and order passed by the learned NCLT and NCLAT. The application filed by RP before NCLT for withdrawal of CIRP was also allowed.

***Case Review**: - Appeals Allowed.*

Kotak Mahindra Bank Limited Vs. A. Balakrishnan & Anr. Civil Appeal No. 689 of 2021, Date of Judgment: May 30, 2022

The holder of a recovery certificate would be a "Financial Creditor" under Section 5 (7) of the IBC and would be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of certificate.

Facts of the Case

The present appeal was preferred by the Appellant 'Kotak Mahindra Bank Ltd.' (KMBL) owing to the default of payment by the M/s Prasad Properties and Investments Pvt. Ltd. (Corporate Debtor 'CD') and three borrower entities. The Facts of the case are that Ind and Bank Housing Limited (IBHL) had sanctioned separate credit facilities to three borrower entities and due to default IBHL had classified the facilities availed as Non-Performing Asset in Nov. 1997. Subsequently, three civil suits were filed by IBHL before Hon'ble High Court of Madras against CD and borrower entities to recover the amounts due. Following the pendency of the suits, the Appellant and IBHL entered into a Deed of Assignment dated 13th October 2006, whereby IBHL assigned all its rights, interest, title, estate, claim and demand to the debts due from borrower entities to Appellant.

Subsequently, a compromise was entered between KMBL and borrower entities on 7th August 2006. The judgment dated 26th March 2007 of High Court had recorded the compromise between the parties and made CD liable to pay the amount of approx. ₹29 crores to KMBL, however the same was defaulted. Thereby KMBL issued a Demand Notice, Possession Notice and Winding up Notice under SARFAESI Act & Companies Act against the CD and Borrower entities. Further aggrieved by continuous defaults of payment, three applications under Debt Recovery Act for issuance of Debt recovery certificate were filed, which were allowed by Debt Recovery Tribunal.

Meanwhile other proceedings between the parties, with regard to a contempt petition filed by KMBL as well as dismissal of applications filed for issuance of Recovery Certificate, and subsequent grant of relief in a review application followed from 2008 to 2017. With respect to the aforementioned Recovery Certificates, on 5thOctober, 2018, KMBL filed an application under Section 7 of the IBC, claiming to be a Financial Creditor, before the NCLT seeking the initiation of CIRP against the CD claiming an amount of approx. ₹836 crores. The Appellant submitted that the court in the case of *Dena Bank Vs. C. Shivakumar Reddy & Anr* had held that if a claim fructified into a final judgment and order/decree, a fresh right may be accrued to the creditor to recover the amount specified in the Recovery Certificate. However, CD submitted that the cause of action had merged into the order of issuance of the Recovery Certificate by the DRT, thus, by application of the doctrine of merger, the debt does not survive.

Supreme Court's Observations

The Apex Court considered various provisions of the IBC and its earlier judgments in the matter of *Dena Bank Vs. C. Shivakumar Reddy & Anr and Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Co. (Ltd.)* and stated that since the Limitation Act would be applicable to applications filed under Sections 7 and 9 of IBC, thus, the applications would fall within the residuary Article 137. It further stated that a final judgment and an order/decree would be binding on the judgment debtor, and once a claim would be fructified into a final judgment and order/decree, and a certificate of recovery would be issued authorizing the creditor to realize its decretal dues, a fresh right would be accrued to the creditor to recover the amount of the final judgment or as specified in the Recovery Certificate.

Further, the Court held that within the meaning of clause (8) of Section 5 of the IBC, a liability with respect to a claim arising out of a Recovery Certificate would be a "financial debt". Consequently, within the meaning of clause (7) of Section 5 of the IBC, the holder of the Recovery Certificate would be a "Financial Creditor", and the holder of such a certificate would be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of the Recovery Certificate.

Order

The Apex Court allowed the present appeal and quashed and set aside the impugned judgment and order passed by the learned NCLAT. The Court further clarified that it has not touched the elaborate arguments advanced by the rival parties upon the merits of the matter and has only decided the legal issues.

Case Review: - Appeal Allowed.

Indian Overseas Bank. Vs. M/S RCM Infrastructure Ltd. and Anr. Civil Appeal No. 4750 of 2021, Date of Judgment: May 18, 2022

SARFAESI proceedings cannot be continued against Corporate Debtor once CIRP is admitted and moratorium is ordered.

Facts of the Case

This appeal was filed against the judgment passed by the NCLAT - New Delhi dated 26th March 2021 whereby it dismissed the appeal filed by the appellant - Indian Overseas Bank, which was in turn filed challenging the order dated July 15, 2020 passed by NCLT - Hyderabad Bench in an Interlocutory Application, vide which the NCLT had allowed the application filed by the former Managing Director of the M/s RCM Infrastructure Ltd. (Corporate Debtor 'CD') and set aside the sale of the assets of the CD.

The Facts of the case are that the Indian Overseas Bank had extended certain credit facilities to the CD, which it failed to repay and eventually, SARFAESI proceedings were initiated against the CD. The Bank took symbolic possession of two secured assets mortgaged exclusively with it in exercise of powers conferred on it under Section 13(4) of the SARFAESI Act read with Rule 8 of the Security Interest (Enforcement) Rules, 2002. An E-auction notice came to be issued by the Bank to recover the public money availed by the CD. At this stage, the CD filed a petition under Section 10 of the IBC before NCLT. NCLT, on January 03, 2019, admitted the petition and a moratorium was also notified. But even thereafter, the Bank continued the auction proceedings and accepted the balance 75% of the bid amount and completed the sale. NCLT, allowing the application filed by Corporate Debtor, passed an order setting aside the sale. NCLAT dismissed the appeal filed by the Bank and therefore it approached the Apex Court.

The bank contended that (1) the sale in question was complete on its confirmation on December 13, 2018 and as such, the admission of the petition on January 03, 2019 by the learned NCLT would not affect the said sale (2) merely because a part of the payment was received subsequently after initiation of CIRP, it will not deprive the Bank from receiving the said money in pursuance to the sale which has already been completed.

Supreme Court's Observations

The Apex Court made reference of its decisions in *Vidhyadhar Vs. Manikrao & Another, Arvind Kumar Vs. Govt. of India & Others* and *Kaliaperumal Vs. Rajagopal & Another* and stated that however, the balance amount was accepted by the appellant Bank on March 08, 2019, the sale under the statutory scheme as contemplated under Rules 8 and 9 of the Rules would stand completed only on March 08, 2019, which date falls much after January 03, 2019, i.e., on which date CIRP commenced and moratorium was ordered. As such, the Apex court was unable to accept the argument on behalf of the appellant Bank that the sale was complete upon receipt of the part payment.

Further in view of the provisions of Section 14(1)(c) of the IBC, which have overriding effect over any other law, any action to foreclose, recover or enforce any security interest created by the CD in respect of its property including any action under the SARFAESI Act is prohibited. It was of the view that the appellant Bank could not have continued the proceedings under the SARFAESI Act once the CIRP was initiated, and the moratorium was ordered.

Order

The Apex court dismissed the present appeal in view of the above observations and upheld the orders passed by NCLAT and NCLT.

Case Review: - Appeal Dismissed.

New Okhla Industrial Development Authority Vs. Anand Sonbhadra, New Okhla Industrial Development Authority Vs. Manish Gupta & Anr. Civil Appeal No. 2222 of 2021 and 2367-2369 of 2021, Date of Judgment: May 17, 2022

The Apex Court was of the view that in the lease in question, there has been no disbursement of any Debt (Loan) or any sums by the appellant to the Lessee. The appellant would, therefore, not be a Financial Creditor within the ambit of Section 5(8) of IBC.

Facts of the Case

The Appellant 'NOIDA' filed appeal No. 2222 OF 2021 against the judgment passed by the NCLAT, wherein NCLAT had held that the NOIDA is an Operational Creditor 'OC' under IBC and cannot be considered as a Financial Creditor 'FC' of the Corporate Debtor 'CD' under the provisions of the Code. The appellant 'NOIDA' initially submitted Form 'B' and claimed as an OC in regard to the dues outstanding under the lease. Subsequently the appellant filed claim in Form 'C' and claimed as FC. Finally, the matter was considered by NCLT which held that there was no financial lease in terms of the Indian Accounting Standards and there was no financial debt. By the impugned order, NCLAT affirmed the view taken by the NCLT.

Further, appeals 2367-2369 of 2021 were filed against an interim order passed by the NCLAT staying the order passed by the NCLT, whereby NCLT had directed to admit the appellant as a FC, and it also directed to admit the whole of the claim of the appellant. In view of the order passed, which is the subject matter of Appeal No. 2222/2021, NCLAT found it fit to pass an order staying the order passed by the NCLT. Hence the present appeals.

The common question in both the appeals were whether the appellant is entitled to be treated as a FC within the meaning of the IBC.

Supreme Court's Observations

The Apex Court made inquiry into the various rules of the Indian Accounting Standards which define the characteristics of a financial Lease and referred to Rule 63 of the IAS which states that a lease will be a financial lease if the term of the lease is for a major part of the economic life of the underlying assets, even if the title is not transferred. The Apex Court held that the lease in question is for a period of ninety years and the principle of the economic life of the underlying asset which is the "land" is inapposite in the present case.

The Apex Court further held that it may not be possible to hold that the lease is for a major part of the economic life of the land. It cannot be said that at the expiry of 90 years the land will cease to be economically usable. Therefore, we cannot accept the argument of the appellant that after 90 years appellant would not get the empty parcel of land and the land would not be of any commercial use to the appellant after the expiry of the lease.

The Apex Court further examined the contention of NOIDA based on Rule 62 and 65 of IAS which states that a lease may be classified as a financial lease if it transfers substantially all the risks and rewards incidental to the ownership of the underlying asset and held that all rewards incidental to the ownership are not transferred to the lessee by NOIDA and thus the conditions of Rule 62 and 65 do not meet in the present scenario and therefore, NOIDA cannot be considered as a FC under Section 5(8)(d) of IBC.

The Apex Court also examined the case of NOIDA in view of Section 5(8)(f) of the Code which classifies a creditor as a FC in the case of a debt. The Court negated the contention of NOIDA and held that in view of the facts of the appeals, it is unable to hold that the lessee has raised any amounts from the appellant. The question, therefore, of considering the last limb of Section 5(8) (f), namely, whether it has commercial effect of a borrowing could not arise. But it is safe to say that the obligation incurred by the lessee to pay the rental and the premium cannot be treated as an amount raised by the lessee from the appellant.

Order

The Apex court dismissed the appeals in view of the above observations and stated that NOIDA is an OC.

Case Review: Appeal Dismissed.

Anand Murti Vs. Soni Infratech Private Limited Civil Appeal Nos 7534 of 2021, Date of Judgment: April 27, 2022

Facts of the Case

The Appellant (Anand Murti) filed the present appeal feeling aggrieved and dissatisfied with the impugned order

on November 22, 2021 passed by the National Company Law Appellate Tribunal, New Delhi 'NCLAT' by which the NCLAT dismissed the appeal preferred by the Appellant, which was filed against the order passed by the National Company Law Tribunal - Delhi Bench (Adjudicating Authority 'AA') dated November 22, 2019 according to which an application was filed by respondent number 2 against the Corporate Debtor (M/S Soni Infratech Pvt Ltd) for initiation of CIRP under Section 7 of the IBC, and appointed an IRP. The respondent number 2 had booked a flat in the housing project launched by the Corporate Debtor, subsequently, vide a letter dated July 31, 2018, the booking was cancelled, and respondent number 2 demanded refund of the amount of ₹32,27,591/- from the Corporate Debtor. The IRP was directed to initiate the CIRP as per the provisions of the IBC.

The Appellant, aggrieved by the NCLT order had filed an appeal before the NCLAT wherein the NCLAT, vide its order on December 19, 2019, passed an interim order directing the IRP not to constitute the Committee of Creditor (CoC). The Appellant had agreed to settle the matter with the respondent number 2 before the NCLAT, further submitting that the housing project had been completed to the extent of 70-75%, and that the funds/private financier for the same had been arranged as well to complete the project. To this, the NCLAT, vide order on January 31, 2020, had directed to the Appellant to file proposed settlement terms/plan, which the Appellant filed on February 13, 2020. Meanwhile, the Appellant had also settled the matter with respondent number 2. Despite this, the NCLAT, vide order on February 26, 2020, modified the interim order dated December 19, 2019, and directed the IRP to constitute the CoC on the ground that the settlement occurred only between the Appellant and the respondent number 2 sans all the allottees. The Appellant, thereafter, approached the Apex Court, and the Court vide order on March 05, 2020, permitted the Appellant to approach the NCLAT for modification of the February 02, 2020, to present the settlement plan covering all the allottees.

In pursuance to the directions issued by the NCLAT dated 29.09.2021, a meeting of various stakeholder was conducted on October 23, 2021, in which the "Modified Resolution Plan" was submitted by the Promoter of the Corporate Debtor, who had also filed an undertaking on an affidavit. Yet, the NCLAT vide the impugned order November 22, 2021, rejected the modification claim on the grounds that there was no settlement with all the homebuyers, and that there was trust deficit amongst the homebuyers, and passed the order.

Supreme Court's Observations

The Apex Court taking into consideration the undertaking filed by the Promoter, and also the fact that there were 7 out of the 452 homebuyers, who had opposed the Settlement Plan, held that it would be in the interest of the homebuyers if the Appellant/Promoter will be permitted to complete the project, and that he has agreed, firstly, that the cost of the flat would not be escalated, secondly, that the project would be completed within a stipulated timeline. The Appellant also undertook to refund the amount paid by the seven objectors. The Apex Court also held that there could be a possibility that if the CIRP is permitted, the homebuyers will have to pay a much higher cost, inasmuch as the offer made by the resolution applicants could be after taking into consideration the price of escalation.

Order

The Apex Court in view of the above observations quashed the NCLAT order dated November 22, 2021, and treated the affidavit filed by appellant to be an undertaking. The Appellant has been permitted to complete the project, and the modification application before the NCLAT accordingly stands allowed. Accordingly, the pending applications shall stand disposed of, and that there shall be no orders as to costs.

Case Review: - Appeal Allowed.

Sunil Kumar Jain and Ors. Vs. Sundaresh Bhatt and Ors. Civil Appeal No. 5910 of 2019, Date of Judgment: April 19, 2022

Wages/salaries of only those workmen/employees who worked during the CIRP are to be included in the CIRP costs.

Facts of the Case

The Appellant (Workmen/employees of M/s ABG Shipyard Limited (Corporate Debtor 'CD') filed present

appeal feeling aggrieved and dissatisfied with the impugned order on May 31, 2019 passed by the National Company Law Appellate Tribunal, New Delhi 'NCLAT' by which the NCLAT dismissed the appeal preferred by the appellants, which was filed against the order passed by the National Company Law Tribunal - Ahmedabad Bench (Adjudicating Authority 'AA') on April 25, 2019 not granting any relief to them with regard to their claim relating to salary, which were claimed for the period involving the CIRP and the prior period.

The CD was admitted to CIRP process vide order dated 01.08.2017 and on 23.10.2017, Company Application No. 348 of 2017 was filed before the AA, to direct the Resolution Professional to make payment to the employees and the workmen. Subsequently, on 09.3.2018, the appellants filed Company Application No. 78 of 2018 in the above before AA, to direct the RP to utilize the number of ₹9.75/- crores approx. to be received from the Indian Coast Guard solely for employees/workmen whereby the AA directed to deposit ₹2.75 crores out of the above amount with the Registry of the NCLT towards disbursement of the outstanding salaries/wages to the appellants, subject to the outcome of IA No. 348/2017 and disposed of Application No. 78/2018.

Subsequently, as no resolution plan could be agreed upon, the RP filed an application for liquidation which was approved by the AA and simultaneously while disposing of Application No. 348/2017 did not grant the relief claimed by the appellants. Aggrieved by the order passed of the AA, the appellants filed appeal before NCLAT, who by its order disposed of the appeal declining to interfere with the order passed by the AA, however, allowed the appellants to file their individual claims before the Liquidator. Further if claim of one or another workmen/employee is rejected, it will be open to them to move before the AA.

Supreme Court's Observations

The issue before the Court was with respect to wages/salaries of the workmen/employees during the CIRP period and the amount due and payable to the respective workmen/employees towards Pension Fund, Gratuity Fund and Provident Fund. The Apex Court while referring to the provisions of the Code, observed that while considering the claims of the concerned workmen/ employees towards the wages/ salaries payable during CIRP, first of all it has to be established and proved that during CIRP, the CD was a going concern and that the concerned workmen/employees actually worked during the CIRP. Further, considering Section 36(4) of the IBC whereby the provident fund, gratuity fund and pension fund are kept out of the liquidation estate assets, the share of the workmen dues shall be kept outside the liquidation process and the concerned workmen/employees shall have to be paid the same out of such provident fund, gratuity fund and pension fund, if any, available and the Liquidator shall not have any claim over such funds.

Order

The Apex Court in view of the above observations partly allowed the appeal and directed the Appellants to submit their claims before the Liquidator and establish and prove that during CIRP, IRP/RP managed the operations of the CD as a going concern and that they actually worked during the CIRP. The Liquidator was directed to adjudicate such claims in accordance with law and on its own merits, irrespective of the fact whether the RP who himself is now the Liquidator. If the above is found is true, then the wages and salaries to be considered and included in CIRP costs and they will have to be paid as per Section 53(1)(a) of the IBC in full before distributing the amount in the priorities as mentioned in Section 53 of the IBC.

Case Review: Appeal Dismissed.

High Court

Jasani Realty Pvt. Ltd. Vs. Vijay Corporation Commercial Arbitration Application (L) No. 1242 of 2022, Date of Judgment: April 25, 2022

Facts of the Case

This Appeal was preferred by Jasani Realty Pvt. Ltd. (Applicant) under Section 11 of the Arbitration and Conciliation Act (ACA), 1996, wherein the Respondent (Vijay Corporation) failed to appoint an arbitral tribunal for which the Applicant had invoked an arbitration agreement through a notice dated December 10, 2021, calling upon the Respondent to agree to appoint an arbitral tribunal to adjudicate the disputes and differences between both the parties under the loan agreements. The

Respondent had provided financial assistance to the Applicant of an amount of approximately ₹4.5 crore in the usual course of business for which a loan agreement referred to as "Agreement No.1", dated April 23, 2015, was signed by both the parties. However, the business scenario got changed, thereby, creating a negative impact during the subsistence of Agreement No.1. Consequentially, another agreement, "Agreement No. 2", dated July 05, 2016, was executed between the parties, under which the repayment of the borrowing was extended from June 30, 2015, to March 31, 2017.

Earlier, there were defaults on the part of the Applicant in the payment of the loan instalments. In discharge of the liability towards the Respondent, the Applicant had issued a cheque, dated September 07, 2021, to the Respondent of an amount of approximately ₹31 crore. The cheque was dishonoured when it was presented for payment which led to the Respondent approach the NCLT to initiate proceedings on October 12, 2021, against the Applicant under Section 7 of the IBC, 2016. Eventually, the Applicant appeared in the proceedings and adjournments were also sought. However, no order was passed by the NCLT admitting the petition as per the provisions of the sub-section (5) of Section 7 of the IBC. The Respondent had also filed an affidavit opposing the petition filed by the Applicant on the ground that the application is an afterthought and an attempt on the part of the Applicant to dilute the prior proceedings before the NCLT. It is to be considered, whether a mere filing of a proceeding under Section 7 of the IBC, 2016, would amount to an embargo on the Court considering an application under Section 11 of the Arbitration and Conciliation Act, 1996, to appoint an arbitral tribunal?

High Court's Observations

In view of the observations of the Supreme Court (SC) in the matter of *Indus Biotech Private Limited Vs. Kotak India Venture (Offshore) Fund ("Indus Biotech")*, the High Court was of the view that Section 8 of the ACA application was not filed by the Applicant in the present case before the NCLT. It is in the context of Section 8 application being filed by Indus Biotech, for referring the dispute to arbitration, the Supreme Court observed that though the Corporate Debtor files for an application under Section 8 of the ACA an independent consideration of the same by the NCLT de- hors the application filed under Section 7 of the IBC and the material produced with it will not arise. The Adjudicating Authority (NCLT) is duty bound to advert to the material available before it, along with the application under Section 7 of the IBC filed by the Financial Creditor to indicate the default along with the version of the Corporate Debtor.

The court was not convinced with the respondent's contention that necessarily the Applicant ought to have filed an application under Section 8 of the ACA before the NCLT and having not filed such application, the present Section 11 application ought to be held to be not maintainable. It further observed that accepting such a submission would lead to an anomalous situation that a mere filing of the Section 7 application would be required to be construed to oust remedy which the law has otherwise provided to enforce an arbitration agreement and redress its claims under the agreed arbitration procedure. Thereafter, if the Section 7 IBC proceedings are admitted, the provisions of Section 238 of the IBC would get triggered to override the application of all other laws wherein the CIRP would commence against the Corporate Debtor as per the provisions of Section 13 of the IBC which would be proceedings in rem.

Order

The High Court in view of the above observations allowed the application by appointing an arbitral tribunal for adjudication of the disputes and differences risen between the parties under the agreements in question. Further, a formal order appointing an arbitral tribunal would not be required to be made as after the judgment was reserved, the parties had settled the disputes stating an arbitration was not warranted.

Case Review: Disposed of.

National Company Law Appellate Tribunal (NCLAT)

Partha Paul (Erstwhile Director of M/S. Multiple Hotels Pvt. Ltd.) Vs. Kotak Mahindra Bank Ltd. and Anr. Company Appeal No. 1138 of 2019, Date of Judgment: June 10, 2022

Facts of the Case

The present appeal was preferred by the Appellant 'Partha Paul' (Erstwhile Director of the Corporate Debtor namely Multiple Hotels Pvt. Ltd.) under Section 61 of the IBC, 2016, against the impugned order dated October 04, 2019, passed by the NCLT, Kolkata Bench (the Adjudicating Authority or AA). Kotak Mahindra Bank (Respondent-1/ R-1 or Bank) had sanctioned facilities for amount of ₹3 crore to M/s. Camelia Educate Services Ltd. (CESL) and ₹8.5 crore each to M/s. Multiple Educational & Manpower Development Trust (MEMDT) and Camellia Educate Trust (CET) respectively in 2012 to further the objectives of the Trust in development of educational services. On disbursement of the loan, an agreement dated November 11, 2012, was executed by and between the borrowers and the bank to the tune of ₹20.80 crore. Furthermore, the CD executed a Corporate Guarantee Agreement in lieu of the above said loans apart from offering its properties in mortgage.

The appellant contended that despite regular payments of Equated Monthly Instalments (EMI), the R-1 failed to provide them the statement of accounts and started disputing on the order of satisfaction of the EMIs in terms of the agreement executed in respect of the financial facilities. He also alleged that the Bank did not honoured orders of settlement passed by the Debt Recovery Tribunal (DRT), Kolkata on December 14, 2018, but initiated multiplicity of proceedings in different avenues of law for the purpose of fulfilling their own mala fide intention and to take over the management of the trust and also of the Appellant's company. However, the R-1, argued that the CD had defaulted the payment of the loan therefore a petition was filed under Section 7 of the IBC, 2016 for initiating insolvency process. As the CD did not turn up despite several opportunities, the NCLT passed an ex-parte judgement for commencement of CIRP.

NCLAT's Observations

NCLAT observed that the impugned order of NCLT dated October 04, 2019, was passed ex-parte. Furthermore, the loan facility was granted to the Trust at an extremely high rate of 25% per annum. The amount was sanctioned to the borrowers for the furtherance of the objective of the Trust for development of education services, and that the Corporate Guarantee Agreement was executed apart from properties being mortgaged for ₹20.80 crore. Further, the Court observed that the CD had paid to the Bank ₹28 crore from 2013 to December 2018.

NCLAT observed that the Bank/R-1 was engaged in forum shopping to the multiple 'Courts/ Tribunals' just to harass the Guarantor as it has moved the High Court of Calcutta to coerce the trust into paying of its debts and involving the Appellant in time consuming and expensive litigation. Citing previous judgements of the Supreme Court, the NCLAT said, "it is a settled law that the practice of Forum Shopping be condemned as it is an abuse of law". Citing the Supreme Court judgement in the matter of *Transmission Corporation of Andhra Pradesh Ltd. Vs. Equipment Conductors and Cables Limited* (2018), the NCLAT stated, "the provision of the IBC, 2016 is not intended to be a substitute to be a recovery forum,".

Order

NCLAT set aside the order of the NCLT and ordered to remand back the matter with a direction to the AA to give a patience hearing to the Appellant. Additionally, there would be no order as to costs, and interim order, if any, passed by the Tribunal would stand vacated.

Case Review: Appeal Allowed.

Amit Gupta Vs. Anil Kohli & Anr. Company Appeal (At) (Ins) No. 445 of 2021 Date of Judgment: June 10, 2022

Facts of the Case

This Appeal was filed by Mr. Amit Gupta, the Appellant, in his capacity as the Successful Resolution Applicant (SRA), under Section 61 of the IBC, 2016 against the order passed by the National Company Law Tribunal (NCLT) Mumbai Bench, the Adjudicating Authority (AA), on April 30, 2021.

The SRA was required a loan amounting ₹77 Crore to satisfy the conditions of the Resolution Plan for which he

approached the HDFC Bank. The HDFC Bank asked the assets of the Corporate Debtor to be free from all sorts of encumbrances to approve the loan. Subsequently, the SRA approached the AA with a prayer that he should be permitted to make payments of the balance amount within two months after the lifting/ removing all attachments, charges, encumbrances, and liens from the assets & properties of the Corporate Debtor and imposing commercial interest @12% per annum from the date it become due & payable. The AA dismissed the application on the ground that it was not vested with the jurisdiction to entertain the prayer.

Further, it was also submitted that the Resolution Plan was approved by an order of AA dated November 26, 2019. However, due to an inadvertent typographical error in the Order, a rectified order was issued on January 27, 2020. In this rectified order the time for making the total payment from the date of approval of the Resolution Plan was reduced from 30 months to three months about which the Appellant was informed on February 11, 2022. Accordingly, the Appellant requested the NCLT to pass an order directing that the time period mentioned for making full payment be reckoned from the date of rectified order i.e., January 27, 2020. The Appellant was also aggrieved with the AA as it had directed him to pay interest @12% per annum from the date it become due and payable as per the Resolution Plan, which, according to him, was contrary to the terms of the Resolution Plan and also contrary to the Magnate of the IBC, 2016. The Appellant also cited disruptions caused by Covid-19 pandemic to seek relief from the Appellate Tribunal. However, citing several previous orders of the Supreme Court, the respondents contended that the relief sought by the Appellant amounts to amendment in the Resolution Plan and it is the responsibility of the SRA to get the properties of the CD free from charges and attachments etc.

NCLAT's Observations

The NCLAT observed that the liability for prior offences etc., particularly removing/lifting attachments/liens/ charges/encumbrances existing prior to commencement of CIRP needs to be dealt with in accordance with the provisions of Section 32(A) of the IBC, which says that such liabilities of a Corporate Debtor shall cease. It observed that the object of the IBC would be defeated if the responsibility for prior offences is put on the SRA, and he should get a clean slate. Citing the judgement in the matter of *CoC Essar steel India Ltd. Vs. Satish Kumar Gupta & Ors.*, the Court concluded that the SRA cannot suddenly be faced with undecided claims. It further observed, "After the Resolution Plan submitted by him is accepted. It is the responsibility of the Resolution Professional to compile the claims submitted to him or observed from record and put the same in the Information Memorandum, so that the Prospective Resolution Applicant have a full idea of its own liability".

On the issue of whether the interest rate be reduced to be made at par with RBI (Reserve Bank of India) base rate for lending to banks with additional 2% margin subject to a limit of 12% per annum or otherwise, the NCLAT observed that since the appellant had already paid the full amount by then there was no question of going back. Hence, the NCLAT approved a rate of interest of RBI base rate for lending to Banks + 2% margin as per the rate of interest applicable between January 27, 2020, to November 15, 2021, subject to a limit of 12% per annum.

Order

The Resolution Professional and the representatives of the Committee of Creditors (CoC) who are the Chairman/ Members of the Monitoring Committee should assist the Resolution Applicant in sorting out the issues pending at various forums be it Excise Authority, Enforcement Directorate etc. The SRA will pay rate of interest of RBI Base rate for lending to banks + 2% margin as per the rate of interest applicable between January 27, 2020, to November 2021 subject to a limit of 12% p.a.

***Case Review**:* Appeal is partially allowed.

Hero Fincorp Ltd. Vs. Liquidator of Tag Offshore Ltd. Comp. App. (At) (Ins.) No. 908 of 2020, Date of Judgment: April 29, 2022

Facts of the Case

This appeal has been filed by the Appellant, a financial creditor of TAG Offshore Limited (Corporate Debtor 'CD'), under section 61 of the IBC, 2016 assailing the judgment of the NCLT-Mumbai Bench (Adjudicating Authority 'AA') passed in Miscellaneous Application filed by Appellant.

The facts of the case are that after the order for liquidation of the CD on September 26, 2019, Mr. Sudeep Bhattacharya (liquidator) informed the Appellant (Hero Fincorp Ltd.) vide e-mail on October 02, 2019, which had charge of vessel Tag 22, that two vessels, namely Tag 6 and Tag 22, assets in the liquidation estate, came close to each other and cause damages. This email was also sent to United Bank of India, which had the charge of vessel Tag 6. The liquidator also mentioned in the email that he contacted a salvage company, namely K.E. Salvage for securing the two vessels for protection. The Appellant submitted that vide e-mail on October 03, 2019, it communicated to the liquidator its willingness to contribute fund for securing the vessel tag 22 and to initiate the job. After completion of the securing operation, K.E. Salvage submitted tax invoice October 09, 2019, amounting to ₹14.75 lacs for services provided.

The Appellant further submitted that it had issued a notice October 09, 2019, to the liquidator indicating its intention to exit from the liquidation process and realise its charge in Tag 22 since it had obtained the statutory remedy for enforcement of mortgage for the vessel by invoking the Admiralty Jurisdiction of the High Court of Bombay and High Court of Andhra Pradesh before the initiation of CIRP of the CD. After issuing the notice and on not receiving any response from the liquidator, the Appellant preferred Misc. Application on November 13, 2019, seeking directions from the AA to allow the Appellant to exit the liquidation process and keep the vessel Tag 22 out of liquidation estate and for including the expenses incurred in securing the two vessels. The Appellant stated that subsequently the AA passed orders in Misc. Application on February 06, 2020, holding that the expenses incurred for securing the vessel cannot be treated as liquidation process expenses and the Appellant should bear the entire expenses incurred by the liquidator in protecting the charge of the Appellant. However, the AA allowed the Appellant to keep its charge of Tag 22 out of the liquidation estate as requested under section 52 of the IBC subject to clearance of proportionate CIRP costs and payment of expenses incurred by the liquidator in securing the vessel Tag 22. On being aggrieved by the said order the Appellant has preferred this Appeal.

NCLAT's Observations

The Appellate Tribunal was of the view that the liquidator acted after receiving consent from the Appellant for preservation and protection of vessels much after the Appellant had invoked Admiralty Jurisdiction of Hon'ble Bombay High Court to realise its security charge in vessel Tag 22. Subsequently, when invoice received from K.E. Salvage Company was sent for payment to the Appellant by the liquidator, the Appellant went for litigation against making payment of said invoice. The Appellate Tribunal did not consider this action of the Appellant logical and in accordance with the actions taken by it to realise its charge in Tag 22. NCLAT did not find any error in the Impugned Order regarding payment to be made by the Appellant, of its proportionate share in the expenses incurred in securing vessel Tag 22 along with securing vessel Tag 6.

Further after the salvage operation was undertaken, the Appellant not only refused to pay the cost of securing and protecting the vessel Tag 22 and engaged the liquidator in protracted litigation. The Appellate tribunal noted that the action taken by the liquidator in protecting and preserving Tag 22 was for the benefit of the Appellant and the litigation undertaken by the Appellant caused expenditure which has ultimately cut into the value of the liquidation estate, thereby affecting the financial interest of the creditors/stakeholders.

Order

The Appellate Tribunal in view of the above observations dismissed the appeal and passed order that the Appellant shall pay a cost of ₹1 lakh as litigation expenses to the liquidator, which shall go into the liquidation estate. Both, the proportional share of the Appellant in securing the two vessels Tag 22 and Tag 6 and the litigation cost shall be paid by the Appellant within 15 days of this judgment.

Case Review: Appeal Dismissed.

Manish Jain Vs. Sh. Rakesh Bhatia Company Appeal (At) (Insolvency) No. 49 of 2022, Date of Judgment: April 19, 2022

Facts of the Case

This Appeal has been preferred under Section 61 of the IBC, 2016, to challenge the Impugned Order on

November 16, 2021 passed by the NCLT- New Delhi (Adjudicating Authority 'AA') dismissing the I.A. filed by the Appellant Mr. Manish Jain (Ex-Director of M/s. P.K. Sales Company Private Limited (Corporate Debtor 'CD')) under Section 60(5) of the Code for 'Contempt' against the Liquidator/the Respondent alleging wilful disobedience of the Order dated 08/01/2020 passed by the Coordinate Bench of the AA.

The impugned order stated that, vide order dated January 08, 2020, AA had directed the Liquidator to not proceed to confirm the sale of the assets of the company until the permission is obtained. This order was passed on the submission made by the Appellant that a scheme under Section 230- 232 of the Companies Act should be considered before proceeding towards liquidation. Subsequently, the present application for initiation of contempt proceedings was filed on the ground that the liquidator had sold away the assets of the company. The main point was that, even after 2 years the applicant did not proceed to file any scheme and petition under Section 230-232 of the Companies Act and was dragging the matter. As there was no scheme/petition filed by the Applicant, the action taken by the Liquidator in regard to the assets of the company should not be considered as 'contempt' and dismissed the IA.

The Appellant stated that the Liquidation Order was passed against the CD and the Appellant along with the sister concern i.e., M/s. P.K. Industries and Dreamland Realtors Private Limited entered into an OTS with the FC for ₹30 Cr. on August 17, 2019. Further the Appellant on indifferent intervals till February 20, 2021, paid a total sum of ₹11 Crores. /- to the FC. He further requested vide email to the Liquidator to file before the AA for necessary approval to revive the CD as he was constrained to file the same before the AA which was opposed by the Liquidator despite the settled law. He also filed an application to bring on record the additional documents pertaining to the payment made to the FC in accordance with the OTS and sent email requesting the Liquidator to forward the Settlement Scheme in the interest of the stakeholders. However, despite the same the liquidator sold the assets of the CD at much lesser price. The Respondent submitted that the AA had vide its order dated July 15, 2020, had given permission to him to liquidate the assets and subsequently the Appellant had through email requested the Liquidator to arrange for physical inspection of the property. He complied with the order of the AA and disposed of the assets conducting a public auction.

NCLAT's Observations

The Appellate Tribunal was of the view that there was no Scheme which was formalised under Section 230 of the Act. Further the Appellate tribunal raised a query as to whether any 'Scheme' was formalised or 'Debt Restructured' with consent as provided under Section 230(2)(c) of the act and filed before the AA or before Appellate Tribunal, the Appellant drew attention towards the OTS settlement facility. However, the CD did not pay the amount even after extension was granted. The Appellate Tribunal stated following, that the Scheme under Section 230 of the Act was never formalized, that the date extended by the High Court of Delhi was lapsed, more than two years were lapsed subsequent to the Order of the Appellate Tribunal, that the Order dated July 15, 2020 attained finality, the Liquidator only complied with the terms of the Order dated July 15, 2020 and lastly there is no Scheme which has been filed till date under Section 230-232 of the Act. Hence, it cannot be said that the action of the Liquidator in selling the asset by public auction, be termed as contempt or any breach of the Order of the AA.

Order

The Appellate Tribunal in view of the above observations dismissed the appeal.

Case Review: Appeal Dismissed.

Sharavan Kumar Vishnoi Vs. Upma Jaiswal & Ors., Company Appeal, (At) (Ins.) No. 371 of 2022, Kumari Durga Memorial Sansthan Vs. Shravan Kumar Vishnoi & Ors., Comp. App. (At) (Ins.) No.374 of 2022, Date of Judgment: April 05, 2022

Facts of the Case

These two Appeals have been filed against the same order dated March 02, 2022, passed by the NCLT – Allahabad Bench (Adjudicating Authority 'AA') in IA No. 59 of 2022. It was filed by Ms. Upma Jaiswal seeking a direction to the Resolution Professional to place the Resolution Plan submitted by the Appellant before the Committee of Creditors 'CoC' whereby the AA after hearing the parties stated that when these provisions are read together along

with the relevant judgement of the Supreme Court, what appears is that the RP is a facilitator and not a gatekeeper. The AA further noticed that in these circumstances, the ends of justice would be met if we direct the RP to place all Resolution Plans along with his opinion on the contravention or otherwise of the various provisions of law before the CoC which should take a considered view in the matter, if not already done.

The Appeal being Company Appeal (AT) (Ins.) No.371 of 2022 was filed by the Resolution Professional challenging the order. The RP submitted that according to his opinion, the plan submitted by Ms. Upma Jaiswal was not eligible as per Section 29A of the IBC and that due to the said difficulty, he was unable to place the plan before the CoC for approval.

In Company Appeal (AT) (Ins.) No.374 of 2022, it was contended that the plan submitted by the Appellant was considered by the CoC. The CoC asked the Appellant to increase its plan value, which was done. It was submitted that at this stage, the AA ought not to have directed the plan of Ms. Upma Jaiswal to be considered by the CoC.

The Resolution Applicant- Ms. Upma Jaiswal refuted the submissions of the Appellants and contended that the question as to whether the plan submitted by her is to be rejected or approved is a question which needs to be decided by the CoC. The RP at best can give his opinion with regard to eligibility of the Resolution Applicant whether it conforms to Section 29A and other provisions of the Code or not. Further the RP of its own cannot withhold any plan and refuse to submit the same before the CoC.

NCLAT's Observations

The Appellate Tribunal took note of the judgement passed by the Hon'ble Supreme Court in the matter of *ArcelorMittal India Private Limited Vs. Satish Kumar Gupta*- (2019) whereby it had stated that the RP is not to take a decision regarding the ineligibility of the Resolution Applicant. It has only to form its opinion because it is the duty of the RP to find out as to whether the Resolution Plan is in compliance of the provisions of the Code or not, the RP can give his opinion with regard to each plan before the CoC and it is for the CoC to take a decision as to whether the plan is to be approved or not.

Further, in the impugned order, the AA noticed that the direction issued to the RP to place all the Resolution Plans along with his opinion on the contravention or otherwise of the various provisions of law. The aforesaid direction clearly indicates that the RP is free to submit his opinion with regard to contravention or otherwise of the various provisions of law. The aforesaid observations took care of the duties and responsibilities of the RP. The RP can give his opinion with regard to each Resolution Applicant and further steps are to be taken by the CoC as per the direction issued by the AA.

Order

The AA in view of the above observations dismissed both the appeals and was of the view that various issues regarding ineligibility or eligibility need not be gone into in this Appeal. It is only after the CoC's decision if any question arises regarding eligibility that can be gone into before the AA in accordance with the law.

Case Review: Appeals Dismissed.

National Company Law Tribunal (NCLT)

Orbit Towers Private Limited Vs. Sampurna Suppliers Private Limited Company Petition No: C.P (Ib) No. 2046/Kb/2019, Date of Order: July 04, 2022

Guarantor, after paying dues to the Creditor, is entitled to initiate Corporate Insolvency Resolution Process against the Principal Borrower under 'Right of Subrogation' of Indian Contracts Act 1872.

Facts of the Case

This petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC or Code) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 was filed by Orbit Towers Private Limited (Financial Creditor) to initiate Corporate Insolvency Resolution Process (CIRP) against Sampurna Suppliers Private Limited (Corporate Debtor). The Corporate Debtor availed a loan of ₹10 crore from the Indian Bank to which the Financial Creditor, due to its business association with the Corporate Debtor, had

provided a corporate guarantee in favour of Indian Bank and also created an equitable mortgage by depositing the title deeds of one of its properties situated in Kolkata. The Corporate Debtor was obligated to repay the loan amount of ₹.10,00,00,000/- along interest and to obtain release of the Financial Creditor's property at Kolkata. Since he was not able to do so, Financial Creditor paid ₹. 8,45,19,907/- to the bank being the corporate guarantor. Thereafter, the Corporate Debtor paid ₹.2,60,00,000/- to the Financial Creditor towards part discharge of its liability and a sum of ₹.5,85,19,907/- remained due and payable. The question of law in this matter is when the liability of the principal borrower i.e., the Corporate Debtor in this case, has been discharged by the Corporate Guarantor i.e., the Financial Creditor in this case, then can the Corporate Guarantor step into the shoes of the Creditor and initiate CIRP against the Principal Borrower.

NCLT's Observations

Sections 140 and141 of the Indian Contracts Act, 1872 talk about "right of subrogation". It is the substitution of another person in place of the Creditor, so that the person substituted will succeed to all the rights of the creditor with reference to the debt. The guarantor's right to be placed in the creditor's position on the discharge of the principal debtor's obligation, to the extent that the Guarantor's property or funds have been used to satisfy the Creditor's claim and to affect such discharge is called the Guarantor's right of subrogation. The Guarantor who performed the obligations of the Principal Debtor which are subject to his guarantee is entitled to stand in the shoes of the Creditor.

The Guarantor may, therefore, sue the Principal Debtor having got and invested with all rights of the Creditor. It was observed by the Hon'ble NCLT that any agreement of guarantee between the Indian Bank and the Guarantor is sufficient for the purpose of bestowing all the rights of the Bank upon the Financial Creditor once the Financial Creditor has discharged the liability of the Corporate Debtor towards Indian Bank. In this matter, the Financial Creditor who executed an agreement of guarantee with the Indian Bank for the financial obligations and loan facilities granted to the borrower/ the Corporate Debtor, is fully empowered to proceed against the Corporate Debtor, as the Financial Creditor.

Order

Since the amount has admittedly been paid by the Guarantor/Financial Creditor to Indian Bank and the said amount was much above the threshold limit fixed by the Code for filing a petition under Section7 of the Code, which was not repaid by the Corporate Debtor despite requests and demands made by the Financial Creditor, the court admitted the petition.

Case Review: - Petition is admitted.