IBC Case Laws

Supreme Court of India

Victory Iron Works Ltd. Vs. Jitendra Lohia & Anr. Civil Appeal No.1743 OF 2021. Date of Supreme Court Judgement March 14, 2023.

Facts of the Case

This appeal was preferred by M/s Victory Iron Works Ltd. (Appellant) before the Supreme Court after being aggrieved by the impugned order passed by NCLAT dated April 08, 2021.

M/s Sesa International Ltd., a financial creditor, filed an application of CIRP u/s 7 of IBC against Avani Towers Private Limited (Corporate Debtor/CD), which was admitted for CIRP by the Adjudicating Authority (AA) dated October 15, 2019. Energy Properties, in its capacity as an 'ostensible owner' purchased land of 10.19 acres from UCO bank which was funded by the CD under a MoU dated January 24, 2008. The CD also entered into an agreement with Energy Properties dated June 16, 2008, for the joint development of the said property wherein exclusive rights regarding the development of the property were handed over to the CD. Thereafter, the CD executed a Leave and License Agreement dated August 19, 2011, under which a license was granted for the use of 10,000 sq. ft. land out of 10.19 acres to M/s Victory Iron Works Ltd (Appellant).

The suspended Board of Directors of the CD informed the RP that 'Energy Properties' was forcefully removing the security guards from the property. Therefore, RP filed an application before the AA under Section 25 of IBC read with Regulation 30 of IBBI (CIRP) Regulations, 2016 seeking appropriate action. After that, the AA directed the Appellant and Energy Properties not to obstruct the possession and activities of the RP and also held at the same time that the order would not prevent the appellant from carrying on their activities in the portion of the land given to them under the Leave and License Agreement.

Aggrieved by the said order of the AA, Appeals were filed, by the Appellant and Energy Properties, before the NCLAT and the same were dismissed. But NCLAT also confirmed the decision of NCLT that the Appellant could use that part of the land on which it had licensed right. However, the Appellant wanted the entire land and

opposed the RP's claim that "development rights are held by the CD that forms it an intangible asset of the CD and must be protected" and argued that AA does not have the power under the IBC to evict a licensee in possession of the property.

Namely, two issues raised before the Supreme Court, *firstly*, what is the nature of the interest that the CD has over the property in question? *Secondly*, whether the jurisdiction exercised by the AA and Appellate Tribunal is vested in them or not?

Supreme Court Observations

The Supreme Court observed that a bundle of rights arising from the MoUs and various agreements entered into by the CD related to the property in question constitute an 'asset' in common parlance denotes 'property of any kind' within the meaning of Section 18(f) and Section 25(2)(a) of IBC. The Court relied on a previous judgement of the Apex Court in the matter of *Sushil Kumar Aggarwal Vs. Meenakshi Sadhu & Ors*. (2019) to conclude that some of this bundle of rights and interests partake the character and shades of ownership rights. Therefore, the RP is duty-bound to include the property in question in CIRP, take custody, and control of the same.

In addressing the second issue, the Supreme Court cited its judgment in *Rajendra K. Bhutta Vs. Maharashtra Housing and Area Development Authority & Anr*. (2020), stating that there is no record of the Appellant occupying any land in excess of what was permitted under the Lease and License Agreement. Therefore, the AA, as well as the Appellate Authority, was right in exercising their jurisdiction.

Order: The impugned orders do not call for any interference.

Case Review: *Appeals Dismissed.*

M/s Shekhar Resorts Limited Vs. Union of India & Ors. Civil Appeal No. 8957 of 2022. Date of Supreme Court Judgement: January 05, 2023.

Facts of the Case

M/s Shekhar Resorts Limited (Appellant) has preferred the appeal before the Supreme Court after the High Court dismissed the writ petition through impugned order dated June 24, 2021.

The Appellant was engaged in providing hospitality services and was registered with the Service Tax Department. The Service Tax Department conducted an investigation evasion of service tax by the appellant and issued the show cause notice demanding payment of dues. Meanwhile, the financial creditors of the appellant submitted application under Section 7 of IBC and the AA vide its order dated September 11, 2018, admitted the application, and declared moratorium under Section 14 of IBC. The CoC approved the resolution plan on June 04, 2019.

On September 01, 2019, "*Sabka Vishwas* (Legacy Dispute Resolution) Scheme, 2019' under section 125 of the Finance Act 2019 was introduced. The Appellant (through its RP) submitted an application (Form No.1) within the prescribed period and thereafter the Designated Committee issued Form No.3 to the Appellant determining the amount of ₹1,24,28,500 as due and payable under the scheme. The AA approved the Resolution Plan on July 24, 2020, and subsequently, the appellant expressed its willingness to pay the full amount as ascertained by the Designated Committee but the same was rejected by the Joint Commissioner on the ground that the last date of payment was June 30, 2020. The Appellant filed the writ application in High Court but the same was dismissed on the ground that (i) High Court shall not issue direction contrary to the scheme; (ii) the relief sought cannot be granted as the Designated Committee is not existing.

The Appellant citing the judgements in *Principal Commissioner of Income Tax Vs. Monnet Ispat & Energy Ltd.* and *Union of India Vs. Asish Agarwal*, contended that High Court has seriously erred in dismissing the writ petition as even after June 30, 2020, as per the instructions issued by the CBEC, the respective Designated Committees continued to function and process the declarations manually. The Appellant asserted that he bonafidely could not deposit the settlement due, on or before June 30, 2020, by virtue of the moratorium period which ended on July 24, 2020. Further, as per the Resolution Plan, the Applicant was required to deposit all statutory dues within 6 months from the effective date into an escrow account. Effective date being July 24, 2020, Service Tax dues along with other statutory dues were deposited in an escrow account on January 08, 2021, i.e., before the expiry of the period of six months. The question raised before the Appellate Tribunal is that whether the appellant can be punished for no fault of its own and be denied the relief even though it was impossible to deposit the settlement amount during the moratorium?

Supreme Court Observations

Citing the judgement of *Calcutta Iron Merchants' Association Vs. Commissioner of Commercial Taxes* and *Gyanichand Vs. State of Andhra Pradesh* the Supreme Court held that no law could compel a person to do the impossible. It would be unfair on the part of the court to give a direction to do something impossible and if a person fails to do so, he cannot be held guilty. Even if the appellant wanted to deposit the settlement amount within the stipulated time, it could not do so in view of the bar under the IBC. The Supreme Court held that to some extent the High Court is right as, while exercising the powers under Article 226 of the Constitution of India, it cannot extend the Scheme. However, the present case is not about extending the scheme, it is about taking remedial measures as the appellant was unable to make the payment due to the legal impediment and the bar in view of the provisions of the IBC. Further, in reference to the ground given that Designated Committees are not in existence, the Supreme Court held that it is required to be noted that the CBCE has issued a circular that in a case where the Court have passed an order setting aside the rejection of the claim under the Scheme after June 30, 2020, the applications can be processed manually.

The Supreme Court stated that as the Appellant has submitted the Form No.1 within the stipulated time and Form No. 3 has been issued, the High Court has erred in refusing to grant any relief to the Appellant.

Order: The Impugned Order is quashed and set aside and the payment of ₹1,24,28,500/- already deposited by the

appellant be appropriated towards settlement dues under "Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019" and the Appellant be issued discharge certificate.

Case Review: *Appeal Allowed.*

National Company Law Appellate Tribunal (NCLAT)

M/s. SMS Foundation & Investment LLP. Vs. J. John Ohilvi Company Appeal (AT) (CH) (INS) No. 41 of 2023. Date of NCLAT's Judgements: March 07, 2023

Facts of the Case

The current Appeal is filed by the M/s SMS Foundation & Investment LLP (Appellant) after being aggrieved by the impugned order dated October 11, 2022 passed by AA.

The AA rejected the Appellant claim to consider him as 'Financial Creditor' because of the fact that the Appellant fall under the category of Shareholder. The Appellant contended that the order was never pronounced by the AA.

The Appellant stated that the order was available online on November 21, 2022, and he received the certified copy of the order on November 24, 2022. The Appellant filed the appeal through e-filing portal on December 23, 2022, but due to serious medical issues and the closure of the Tribunal on account of holidays the Appellant filed the Hard Copies of the appeal on December 28, 2022, and therefore, he had filed the instant 'Condonation of Delay' through IA in the current appeal to avoid any discrepancy.

The Appellant relying on the judgment in *Balaji Baliram Mupade & Anrs Vs. The State of Maharashtra & Ors.* pleaded that the delay of five days in physical filing of the hard copies may be condoned and the appeal may be allowed.

The RP of M/s Harsha Exito Engineering Pvt. (Respondent) citing the judgement in V. *Nagaranjan Vs. SKS Ispat and Power Ltd.* sought the dismissal of the appeal on the ground that the Appellant had knowledge of the order dated 11.10.2022 and the limitation period started from that date.

NCLAT Observations

The Appellate Tribunal placing their reliance on the judgment given by Hon'ble Supreme Court in *Central Bank of India Vs. Vrajlal Kapurchand Gandhi & Anr.* held that the order in question is a matter of 'Judicial Record' of the AA and the contra stand taken on behalf of the Appellant is not accepted.

The Appellate Tribunal further stated that the Appellant cannot have any grievance as the impugned order was pronounced in Open Court in the presence of authorized representative of the appellant. There is sufficient compliance of Rule 150(1) of the NCLT Rules, 2016 and hence the limitation will be counted from October 11, 2022.

The Appellate Tribunal observed that the 45 days period lapsed on November 25, 2022 and E-filling of the Appeal papers were made by appellant on December 23, 2022, i.e. on 73rd day counted from impugned order dated October 11, 2022, after deducting 45 days from Outer Limit period, there is a delay of '28 days' and there is no power enjoined upon the Appellate Tribunal to condone the delay beyond the prescribed period as per Section 61 of IBC 2016.

Order: The 'Condone Delay Application' filed by the appellant is not entertained and the same stand rejected.

Case Review: *Appeal Dismissed.*

Principal Commissioner of Income Tax & Ors. Vs. Assam Company India Ltd (ACIL) Company Appeal (AT) (Insolvency) No. 243 of 2022. Date of NCLAT's Judgement: February 07, 2023.

Facts of the Case

An appeal is filed by the Principal Commissioner of Income-tax & Ors. (Appellant) after being aggrieved by the order dated January 20, 2021, passed by the AA.

CIRP Application was filed against M/s Assam Company India Limited (Respondent) by its financial creditor M/s Seri Infrastructure Pvt. Ltd. The AA admitted the application on October 26, 2017, and appointed an RP. On November 14, 2017, the Appellants placed a demand of income tax before RP for the assessment year 2013-14 and 2014-15 totalling to ₹16,20,25,953/. The RP informed the Appellant that the claim can't be admitted since an appeal regarding both the assessment year was pending before Commissioner of Income Tax (A) and the new promoter of the Respondent will pay the demand after the decision of CIT(A) under the statutory liability.

Subsequently, RP informed Appellant that AA may consider payment of ₹1,97,92,084/ (being 15% of the outstanding due) and the balance amount being considered as "contingent liability" will be payable by the Respondent upon final outcome of the appeal. As per AA's Order dated September 20, 2018, the Appellant received the payment of ₹1,20,23,691/- as a tranche payment against dues. Meanwhile appeal of both Assessment year 2013-14, 2014-15 was dismissed by CIT(A) vide order dated January 16, 2019, and the demand for ₹13,41,75,287/- stood outstanding. The Appellant on September 20, 2018, filed an application for review of the AA's order seeking clarification and for necessary directions to the RP for submission of the revised resolution plan incorporating the entire amount alleged to be due to the Appellants. The AA vide its order dated October 22, 2019, stated that the earlier intimation of the RP is to be read with the Resolution Plan and the appellants have a right to lay its claim before the new promoter of the Respondent Company.

The Appellants demanded the total outstanding dues with interest from the respondent but since there was no compliance of the demand notice, bank attachment in (i)Allahabad Bank Dibrugarh Branch, and (ii) Allahabad Bank, Industrial Finance Bank, Kolkata were carried for remittance of outstanding amount. It was found that the accounts were marked debit freeze. Meanwhile the Respondent approached the ITAT and obtained the stay on demand for three months. Simultaneously, the Respondent filed an application before AA under Section 60(5)(c) of the IBC stating that the claims of the Appellants cannot be entertained after 15 months of the approval of the Resolution Plan and therefore the Appellants vide order dated January 20, 2021 were directed to withdraw the attachment.

NCLAT Observations

The Appellate Tribunal referring to the judgement of Supreme Court in *State Tax Officer (1) Vs. Rainbow Papers Limited*, held that the dues of the Appellants are 'Government dues' and they are Secured Creditors. Impugned order of the AA failed to consider that these dues are of the Revenue Department and if not paid, the Appellants would be in great difficulty and grave injustice would be caused to the Revenue Department and a huge loss to the public exchequer. AA has erred in stating that the Appellants claims cannot be entertained after 15 months of the approval of the Resolution Plan as the Appellant have made the recovery of the outstanding demand on November 14, 2017 which is prior in time to the resolution plan being approved on September 20, 2018.

Order: The impugned order dated January 20, 2021 passed by the AA is hereby set aside and the matter is remitted back to the AA with a request to hear the parties.

Case Review: *Appeal disposed of.*

Ashish Gupta Vs. Delagua Health India Pvt. Ltd. & Ors. Company Appeal (AT) (Ins.) No. 17 of 2022. Date of NCLAT's Judgements: February 01, 2023.

Facts of the Case

An Appeal has been filed by Mr. Ashish Gupta (Appellant) after being aggrieved by the AA order dated October 11, 2021, wherein the AA dismissed its petition u/s 9 of IBC by holding it to be a collusive petition without giving any reasons. The Appellant was working as a Director of Delagua Health India Pvt. Ltd (Corporate Debtor/ CD) since February 11, 2014, and tendered his resignation on July 02, 2017. The Appellant sent a Demand Notice to the CD for clearing his estimated salary of ₹40,50,000 but since no response was received from the CD, the Appellant filed the petition u/s 9 of the IBC.

Meanwhile, Delagua Health Limited (Grand Bahamas) and Delagua Water Testing Limited, (collectively hereinafter as "Respondent"), holding 98.98% stake in CD filed an intervening application. The Appellant citing the judgement in *Pratap Technocrats (p) Ltd Vs. Monitoring Committee of Reliance Infratel Ltd.* contended that IBC does not provide for equity jurisdiction and the Respondent filed the intervening application even though they did not have any locus in the matter.

The Respondent submitted that Appellant and Respondent had signed a Consultancy Agreement on November 04, 2013, for assisting the Respondent in setting up an entity in India. After incorporation of the company i.e., CD, the Appellant along with Mr. K.K. Vashishtha were appointed as the Directors. The Respondent asserted that both the Directors resigned on same day and acted in collusion to serve Section 8 notice with an ulterior motive. The Respondent stated that the Appellant still had the control over all modes of communications related to CD and

hence demand notice never actually got served. The Respondent submitted that the Section 9 Application is not maintainable and contended that the Appellant violated clauses of the Consultancy Agreement by engaging himself in the activities of a competing entity thus causing loss to the CD. Further, the Respondent claimed that the Appellant had made excess withdrawals of ₹19,33,418/- from the accounts of the CD purportedly on account of tour and travelling without submitting the supporting documents. The question raised before the Appellate Tribunal is: - (a) Petition filed before AA u/s 9 of code is collusive petition or not? (b) Whether the Respondent are entitled to defend the interests of CD? (c) Whether there is any pre-existing dispute surrounding the operational debt.

NCLAT Observations

The Appellate Tribunal held that in-spite of having full knowledge of the fact that Mr. K.K. Vashishtha had already resigned from the post of director, the Appellant addressed the demand notice to him which puts question marks on the bona-fide of the Appellant. Appellate Tribunal further stated that it is a well settled canon of natural justice that anything which eludes or frustrates the recipient of justice should be avoided and reasonable opportunity of hearing be allowed to advance the cause of justice. The Respondent, being the majority shareholders holding 98.98%, deserves a chance to safeguard the rights and interests of the CD and therefore, the submission filed by Respondent deserves to be considered on merit. While citing the Judgement of *M/s Brand Realty Services Ltd. Vs. M/s Sir John Bakeries India Pvt. Ltd*. the Appellate Tribunal upheld that it is a settled principle of law that even in absence of notice of dispute, the AA can reject the Section 9 Application if there is a record of dispute. Excess cash withdrawals from company's account by the Appellant on account of tour and travelling without any valid proof proves that the claim by the Appellant is disputed.

Order: Appellate Tribunal held that the AA has rightly dismissed the Section 9 application of the Appellant and that the impugned order does not warrant any interference as there is no merit in appeal.

Case Review: *Appeal dismissed.*

Jindal Stainless Ltd.Vs. Mr. Shailendra Ajmera, RP of Mittal Corp Ltd. & Ors. Comp. App. (AT) (Ins.) No. 1058 of 2022. Date of NCLAT's Judgement: January 18, 2023.

Facts of the Case

CIRP was initiated against Mittal Corp Limited, and an RP was appointed by the AA via order dated November 10, 2021. The RP received six resolution plans including the plans submitted by the Jindal Stainless Ltd. (Appellant) and by Shyam Sel and Power Ltd (Respondent). The CoC in 12th meeting held on July 07, 2022, decided to undertake a Challenge Process to give an opportunity to the Resolution Applicants to improve their plans. After receipt of the unconditional acceptance, Challenge Process was conducted in the 13th CoC meeting wherein all the Resolution Applicants were notified that the signed and compliance Resolution Plan must be submitted by July 18, 2022. Overall, four plans (including plans of the Appellant and Respondent) were submitted by the due date. On July 19, 2022, the Respondent sent an e-mail to the RP stating that it is willing to submit the entire NPV offered as upfront payment within 30 days. On July 29, 2022, Respondent sent another email further improving his offer.

The CoC in the 17th meeting held on August 03, 2022, resolved to put all four plans to vote. Voting was to commence from August 05, 2022, till August 26, 2022, meanwhile the Respondent filed an Interlocutory Application before the AA seeking a direction that RP should consider its offer dated July 29, 2022, and place the same before the CoC. The AA allowed the appeal and directed CoC to consider the revised resolution plan of the respondent. The RP in pursuance of the order passed by the AA stopped the voting process. The Appellant submitted that AA committed error in issuing the impugned direction. The adoption of Challenge Process by the CoC is in accordance with Regulation 39(1A) (b) and after going through the Challenge Process, the Respondent cannot be permitted to revise its plan. The Appellant contended that the CIRP has to be completed in the timeline and any interdiction by the AA, as has been done by the impugned order, is bound to delay the completion of the process which is not object and purpose of the IBC. The Respondent submitted that the object of the Code is maximisation of the assets of the CD and the AA has rightly issued direction to the RP to place the revised offer. Further, the Respondent submitted that Regulation 39 (1A) is only

directory and the CoC has full jurisdiction to permit the resolution applicants to further revise the resolution plan.

The question raised before the Appellate Tribunal is that whether direction given to CoC by AA regarding acceptance of revised resolution plan after the completion of Challenge Process is accepted or not?

NCLAT Observations

The Appellate Authority citing the judgment of the Supreme Court in *Ngaitlang Dhar Vs. Panna Pragati Infrastructure Private Limited & Ors.* held that after the adoption of the Challenge Method, a Resolution Applicant cannot be allowed to submit a revised plan. The timeline in the IBC has its salutary value and it is the wisdom of the CoC to vote on the Resolution Plan after completion of Challenge Process and not to consider any negotiation or further modification of the plan. The Appellate Authority held that the AA should not have been interfered with the voting on the resolution plan without any valid reason. As result of the order of the AA the process of voting, which was already commenced on August 07, 2022, was abandoned by the RP.

Order: The Appellate Authority set aside the order passed by the AA dated August 11, 2022. Further, the RP is directed to initiate fresh voting process on the resolution plans received in the process. The CIRP is extended till February 28, 2023 by which date the RP may file an appropriate application before the AA bringing relevant facts and development in the CIRP on record.

Case Review: *Appeal disposed off.*

Wave Megacity Centre Private Limited Vs. Rakesh Taneja & Ors. Company Appeal (AT) (Insolvency) No. 918 of 2022. Date of NCLAT's Judgement: January 05, 2023.

Facts of the Case

An appeal is filed by the Wave Megacity Centre Private Limited "Wave Megacity", the Corporate Debtor (Appellant) at NCLAT after aggrieved by order dated June 06, 2022, passed by National Company Law Tribunal, New Delhi. A Lease Deed dated September 02, 2011, was signed between Noida Authority and Wave Megacity Ltd. in respect of Plot No.CC001, measuring 618,952.75 sq. mtrs. situated at sector 25A and sector 32, NOIDA for a period of 90 years.

After the allotment, the Appellant launched multiple residential and commercial projects on the Project land in 2011- 12 in the parent's name "Wave Mega City Centre. The possession of the Units in the Residential Project was promised to be handed over to the Homebuyers by 2016, for which Appellant had taken 90% consideration from majority of Homebuyers before 2016 itself. The Appellant did not complete the construction nor handed over the possession and from 2017 onwards, the construction of the Project was stopped. Meanwhile State government announced the Project Settlement Policy (PSP) in the year 2016 allowing developers/ builders to return Project land if they were unable to construct upon.

Under the said project, the Appellant surrendered the area of 454,131.62 sq. mtrs. The Area of 56,400 sq. mtrs was allotted to the Wave Megacity in consideration of the various payments made until the year 2017 and the Area of 1,08,421.13 sq. mtrs was allotted to Wave Megacity at the prevailing rate of year 2017, i.e., ₹1,60,000/- per sq. mtrs. Noida authority issued various demand notices to appellant for clearing the dues, however appellant challenged those notices. Meanwhile the CD filed an Application under Section 10 of the Code dated March 25, 2021, praying for initiation of CIRP on the ground of default on its part. However, several Intervention Applications were filed raising objection to the main Company Petition by the Homebuyers and the Noida Authority, pleading that Petition under Section 10 by the CD has been filed fraudulently and with malicious intent for the purpose other than for resolution of insolvency.

NCLAT Observations

The Appellate Tribunal observed that the resignation of Directors (being directors from day 1 in the company) just few months before filing of Section 10 Application and claiming dues as Financial Creditor in Section 10 application fully proves the malicious intention of the Corporate Debtor. The Adjudicating Authority noted that there is total 285 cases pending against the Corporate Debtor, involving an amount of more than ₹253 crores. Thus, it indicates that dominant purpose and object of filing Section 10 Application was to save the Corporate Debtor from liabilities, responsibilities, and prosecution.

The NCLAT referred to Hon'ble Supreme Court judgement in *Ramjas Foundation and Anr. Vs. Union of India and Ors.* "That a person is not entitled to any relief, if

he has not come to the Court with clean hand." The Court could not find any error in rejection of Section 10 Application by AA.

Order: The Appellate Tribunal was satisfied that Adjudicating Authority did not commit any error in allowing Section 65 Applications and rejecting the Section 10 Application because initiation of proceedings under Section 10 was done fraudulently and maliciously for purpose other than resolution.

Case Review: *Appeal dismissed.*

Edelweiss Asset Reconstruction Company Ltd. Vs. Perfect Engine Components Pvt. Ltd. Company Appeal (AT) (Ins.) No. 840 of 2021. Date of NCLAT's Judgement: December 22, 2022.

Facts of the Case

Edelweiss Asset reconstruction Company Limited (Appellant) preferred the appeal under Section 61 of IBC against the AA's order wherein their Section 7 application against Perfect Engine Components Pvt Ltd. (Respondent) was dismissed. The Respondent had outstanding liability of ₹62,96,33,561.36 towards SBI, which the latter transferred to the Appellant by executing Assignment Agreement. The AA was of view that the cause of action arose on March 31, 2009/June 28, 2012 but the petition was filed on March 08, 2020 which is beyond three years and therefore the same was barred by Limitation Act, 1963.

The Appellant contended that, though the date of Respondent being NPA is June 06, 2009, the letter of acknowledgement letter dated March 31, 2010, to March 31, 2012, should be taken into consideration together with the Demand Notice dated June 06, 2012 issued under Section 13(2) of SARFAESI Act, 2002 to the Respondent by SBI. The Appellant asserted that the Respondent acknowledged its liability by signing the Restructuring Package sanctioned by the Appellant, firstly on November 07, 2014, and secondly on June 30, 2017. Later, Both the Restructuring was cancelled due to various default by the Respondent and consequently Recovery Certificate was issued by DRT Pune in favour of the Appellant on November 22, 2016, and secondly on July 26, 2017. It was further highlighted that the Respondent has acknowledged the liability in the Balance Sheets from FY 2014-15 to FY 2018-19.

The Appellant contended that the sale notice was issued on December 06, 2019, against which reply was filed by the Respondent on January 31, 2020. Subsequently, the Section 7 application was filed on August 07, 2020 and therefore the application is well within the period of Limitation. Citing the judgements in *Sesh Nath Singh & Anr. Vs. Baidyabati Sheoraphuli Cooperative Bank Ltd. & Anr*. and *Dena Bank (now Bank of Baroda) Vs. C. Shivakumar Reddy & Anr.* the Appellant stated that the AA has erroneously dismissed the application.

The Respondent citing the judgements in *Innoventive Industries Ltd. Vs. ICICI Bank & Anr.* and, *Reliance Asset Reconstruction Co. Ltd. Vs. Hotel Pooja International (P) Ltd*. stated that 'letter of acknowledgements' between March 31, 2010 and March 31, 2012 cannot be relied upon as there is no evidence on record to show that they were signed prior to the expiry of the three years Limitation from 2009. Further, there is absolutely no 'default' and that the Appellant originally was acting as an intermediary in working out a proposal of OTS to be offered by SBI and hence was aware of the financial condition of the 'Corporate Debtor.

The question raised before the Appellate Tribunal is that the whether the AA was justified in dismissing the Application filed under Section 7 of the Code as 'barred by Limitation' and also holding that there was no 'default'.

NCLAT's Observations

The Appellate Tribunal referring to the *Dena Bank (now Bank of Baroda) Vs. C. Shivakumar Reddy & Anr.* was of view that an offer of one-time settlement of a live claim, made within the period of limitation, should also be construed as an acknowledgment to attract Section 18 of the Limitation Act. Moreover, a judgment or decree for money or the issuance of a certificate of recovery in favor of the financial creditor, would give rise to a fresh cause of action for the financial creditor, to initiate proceedings under Section 7, within three years from the date of the judgment or decree for money or the issuance of a certificate of recovery if the dues of the corporate debtor to the financial debtor remains unpaid.

Referring to the *Laxmi Pat Surana Vs. Union Bank of India & Anr.* case the Appellate Tribunal held that Section 7 of IBC comes into play when the corporate debtor commits "default". Section 7 consciously uses the

expression "default" — not the date of notifying the loan account of the corporate person as NPA. Section 18 of the Limitation Act would come into play every time when the Corporate Debtor acknowledge their liability to pay the debt.

The Appellate Tribunal held that record shows that the Respondent has been consistently acknowledging its 'debt' from March 31, 2010 onwards by way of letters in Restructuring Packages, and also by way of communication the Appellant/ 'Financial Creditor' for Restructuring, apart from the liability being shown in the Balance Sheets. Therefore, Section 7 Application is not 'barred by Limitation', and that there is a 'debt' and 'default'.

Order: The impugned order dated August 10, 2021, is set aside and the AA is directed to proceed in accordance with law.

Case Review: *Appeal Allowed.*

High Court

TATA Steel BSL Limited Vs. Venus Recruiter Private Limited & ORS LPA 37/2021 and C.M. Nos. 2664/2021, 2665/2021 & 2666/2021 LPA 43/2021, and C.M. Nos. 3196/2021 & 3198/2021. Date of High Court Judgement: January 13, 2023.

Facts of the Case

The present LPA, no. 37 & 43 of 2021 have been filed by Tata Steel BSL Ltd. and the Union of India (Appellants) against the order passed by Ld. Single Judge High court in favour of M/s Venus Recruiter Pvt. Ltd (Respondent).

Due to default in repayment of its credit facilities, SBI filed a petition under Section 7 of the IBC before the AA seeking initiation of CIRP of M/s Bhushan Steel Limited (CD). The AA admitted CD to CIRP and appointed an RP. On March 20, 2018, the CoC approved the resolution plan proposed by Tata Steel Ltd and accordingly the RP filed the resolution plan with AA on March 28, 2018. Before the approval of the AA, Forensic Auditor of CD, submitted a report to the RP intimating several suspect transactions. One of the suspected transactions was between the Respondent and CD for supply of manpower which inter-alia contained a clause stipulating payment of 10% service charge to Respondent in lieu of the manpower supplied. The allegation was that 10% service charge was paid in lieu of manpower supply could have been preferential in nature.

On April 09, 2018, the RP filed an avoidance application u/s 25(2)(j),43,51,66 of IBC before AA. On May 15, 2018, the AA approved the Resolution Plan of Tata Steel and the new management being Tata Steel BSL Ltd assumed control. Later, The AA admitted the Avoidance Transaction Application and issued notices to the respondent companies for making them party to the application. Aggrieved by the Order of the NCLT, Respondent filed writ petition before the Ld. Single Judge High court seeking relief borne out of avoidance application. The Hon'ble judge of the High Court observed that RP becomes functus officio after resolution of the corporate debtor that's why avoidance application is "as void and non-est since CIRP had concluded".

The question raised before the High court (Divisional bench) are:- (a) Whether an alternate efficacious remedy existed before the NCLAT? (b) Whether avoidance applications survive CIRP in cases where Resolution Plans are unable to account for such applications? (c) If avoidance applications survive CIRP in such cases, who pursues them? Whether RP is rendered functus officio upon conclusion of CIRP?

High Court's Observations

The Hon'ble High court (Divisional bench) referring to the judgement of the Apex court in *Innoventive Industries Ltd Vs. ICICI Bank*, *Gujarat Urja Vikas Nigam Ltd. Vs. Amit Gupta*" ,and *Titaghur Paper Mills Co. Ltd Vs. State of Orissa* held that the phrase "arising out of" or "in relation to" as situated under Section 60(5)(c) of the IBC is of a wide import and it is only appropriate that such applications are heard and adjudicated by the AA, i.e., the NCLT or the NCLAT.

CIRP and avoidance applications, are, by their very nature, a separate set of proceedings and adjudication of an avoidance application is independent of the resolution of the CD and can survive CIRP. The Court stated that the money borrowed from creditors is essentially public money and the same cannot be appropriated by private parties by way of suspect arrangements and therefore, the Adjudicating Authority will continue to hear the application. The High Court further held that the RP will not be functus officio with respect to adjudication of avoidance applications. The method and manner of the

RP's remuneration ought to be decided by the Adjudicating Authority itself. The amount that is made available after transactions are avoided cannot go to the kitty of the resolution applicant. The benefit arising out of the adjudication of the avoidance application should be made available to the creditors who are primarily financial institutions.

Order: The impugned Judgment is set aside. The NCLT is directed to proceed ahead with the hearing of avoidance application. In accordance with Sections 44 to 51 of the IBC, 2016, the amount which is recovered can be distributed amongst the secure creditors in accordance with law as determined by the NCLT.

Case Review: *Appeals disposed of, along with pending application(s), if any.*

National Company Law Tribunal (NCLT)

R. Venkatakrishnan (Liquidator) Vs. GC Logistics India Pvt. Ltd. and Others IA (IBC)/ 1018 (CHE)/2022 IN CP/759/(IB)/CB/2018. Date of Judgement: February 19, 2023.

Facts of the Case

Phoenix ARC Private Ltd. in its capacity of Financial Creditor filed an application under Section 7 of the IBC in the year 2018 to initiate CIRP of St. John Freight Systems Ltd. (hereinafter "CD"). The same was admitted by NCLT Chennai through an order dated December 10, 2018. However, as the CD could not be resolved through a Resolution Plan, the AA issued an order for Liquidation of the company on November 26, 2019.

The promoters of the CD approached NCLAT against the Liquidation. Though the Liquidation order was stayed, the NCLAT finally dismissed the appeal stating that there is no merit in the appeal. Subsequently, the first meeting of Stakeholders Consultation Committee ("SCC") was held for sale of the CD as a Going Concern. In the meeting discussions were made on three proposals but none of the three proposals could receive required percentage of votes. Consequently, all the three proposals were rejected, and a fresh Expression of Interest (EOI) was published. The SCC considered the bids received in the second EOI and rejected all of them. Later, an offer letter from Global Corp's Logistics LLC was received and pursuant to it the SCC filed an application with the AA to approve Swiss Challenge Method with Global Corp's Logistics LLC offer as base price. After receiving the approval of the AA, the Liquidator conducted the Swiss Challenge, and all the documents were presented before the AA for approval of Sale of the CD Going Concern'. Mr. Karthikeyan, proprietor of M.S.K. Lorry Booking Office, being Operational Creditor of the CD, objected to the sale of CD as going concern and filed petition under section 60(5) of IBC.

NCLT's Observations

Citing the judgement of the NCLAT in */s Visisth Services Ltd vs. Mr. S.V. Ramani* the AA held that that the proposal for sale of CD as a Going Concern was in conformity to Regulation 32A of IBBI (Liquidation Process) Regulations, 2016. The AA was of view that considering the business nature, MSME Status and the employees of the CD, it is necessary to pave way for the smooth revival.

Further, the AA put on record the submission of Liquidator that the proposed sale of CD as a Going Concern represents the best prospect of revival of the CD which will continue to provide gainful employment to 320 direct employees and 220 indirect/ contract/ seasonal employees. The sale of the company as a Going Concern represents the best option for maximization of value as opposed to selling the assets of the CD.

Order: AA approved the sale of the CD as a Going Concern and ordered that the CD shall not be dissolved. Besides, the AA ordered that the status of the Corporate Debtor be changed from "in liquidation" to "Active" in records of the Registrar of Companies. Besides, other required reliefs were also granted to the applicant.

Case Review: *Application Admitted. Other IAs disposed of.*