Address By Shri Ashok Kumar Bhardwaj, Hon'ble Member (Judicial), NCLT

Guest of Honour at the International Conference (Physical) on "Cross-Border and Group Insolvency in India: Challenges and Opportunities" organized by IIIPI jointly with IBBI, and ICAI in New Delhi on April 13, 2024.

Shri Ashok Kumar Bhardwaj
Hon'ble Member (Judicial)
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Shri Ashok Kumar Bhardwaj joined NCLT, New Delhi as Member (Judicial) on November 18, 2022. Earlier, he was Member (Judicial) at Central Administrative Tribunal (CAT) where he disposed of record number of cases. At CAT, he also led various Administrative Committees including the one which examined the proposal for umbrella legislation for tribunals.

Shri Bhardwaj did his masters in Corporate Law and got enrolled as an Advocate on September 17, 1990. He represented Union of India in record number of cases before high courts of Delhi, Guwahati, Chandigarh, and Allahabad, and the Supreme Court. He was also standing counsel for Prasar Bharti, UPSC, BSNL/MTNL and special counsel for Railways. Besides, he has represented UOI before CLB, BIFR, AAIFR, CAT, AFT etc.

Speaking as the Guest of Honour in the International Conference on "Cross-Border and Group Insolvency in India: Challenges and Opportunities" organized by IIIPI jointly with IBBI, and ICAI in New Delhi on April 13, 2024, Shri Bhardwaj shared his views on development of Cross-Border Insolvency and Group Insolvency frameworks from global perspective.

Read on to know more…

While I stand here to interact with you, I extend my thanks to Hon'ble President – NCLT for nominating me to speak to you. His lordship's untiring efforts are taking the NCLT to a new height. It is heartening to see that he does not take any break between judicial, administrative and infrastructure related work. To motivate members of the NCLT, he takes regular meetings and guides them with all aspects of the NCLT.

When we talk of Cross-Border Insolvency, the first question comes before us is the dépeçage. The dépeçage of legal rules, the dépeçage of jurisdictions, and the dépeçage regarding enforcement of the judgements. As various countries have different rules, the first problem arises is to synchronise and evolve a coordination. There are different schools of thought regarding coordination among various jurisdictions – *firstly,* Universalistic which suggest that there may be a common regime and office of insolvency may be in the most relevant country where the Corporate Debtor is having its administrative office while other political territories should coordinate for implementation. Another thought is - Territorial, which states that the law of different territories may be followed and there should be coordination for compliance of the CIRP commenced in a particular territory. *Thirdly,* the Hybrid thought, which contemplates that there should be multilateral conventions which may suggest certain common regimes. The common regime may be followed and the regime applicable to different territories may also be followed and then there may be a harmony.

It is often talked as if the Cross-Border Insolvency is very modern thought that is not so. The idea of Cross-Border Insolvency dates back to 1889, when seven conventions were signed between different countries in Montevideo, the capital of Uruguay, of which one was related to Cross-Border Insolvency and that was in the nature of hybrid sort of insolvency i.e., different territories may follow their own regimes, there may be certain common provision and all will cooperate in compliance and enforcement

of CIRP. Further in the year 1930, there was change in the convention and at the same time there was another convention in Eastern European countries on Cross-Border Insolvency of hybrid regime only. In 1980, International Bar Association passed a model International Insolvency Act but that was never adopted.

In the modern era, we talk of two set of rules on Cross-Border Insolvency - UNCITRAL Model Law - 2000 and European Commission (EC) Regulaitons-2000. UNCITRAL Model Law – 2000 was adopted on 30th June 1997 while EC Regulations were adopted on 29th May 2002. The main features of UNCITRAL Model Law are COMI (Centre of Main Interest) and CONMI (Centre of Non Main Interest). COMI means the office of insolvency may be in the territory where the Centre of Main Interest of the CD is there, but it may also be at CONMI where other commercial establishments are present. But the most required thread is that all the political territories should ensure implementation of the CIRP wherever it commences. Another aspect is that domestic creditors should not be given preference over foreign creditors. The EC Regulations 2000 are no different. They also talk of same procedure and same mechanism. The only difference between the two is, while UNCITRAL Model Law emphasizes on resolution i.e. putting the Corporate Debtor back to its feet, EC Regulations talks of divesting the CD of its assets either fully or partially. Thus, it encourages liquidation or winding up. The UNCITRAL Model Law is applicable in 46 countries while EC Regulations is applicable only to European Countries.

The Cross-Border Insolvency is also in vogue even by default. In one of such cases, the Educom Solutions, a holding company of Educom Asia Pacific stood as a guarantor when Educom Asia Pacific took loan from State Bank of Singapore and pledged shares of a US based company i.e., Learning Inc. and Security for loan. There was default in payment. State Bank of Singapore could realize the assets viz. shares of Learning Inc. The proceeds of the shares could not satisfy the loan. Then Educom Solutions, which was undergoing insolvency in India was made liable to pay the remaining amount. The Educom Solutions moved an application before NCLT saying that State Bank of Singapore sold the shares at much lessor price and there was no proper valuation. If there was proper valuation, the proceeds could have met the financial liability i.e., loan. Thus, there could have been no reason to stake claim in the CIRP proceedings before NCLT. Then an order of valuation was passed.

In our country, the provisions of CPC also take care of Cross-Border litigations. There is a provision that the orders passed by a foreign court, provided there is reciprocity, will be implemented in India as an order passed by the Indian Court. Thus, provisions related to Cross-Border Insolvency lies in the IBC as sporadic law. The Explanation (b) of Clause (g) under Section 18 (1) of the IBC, provides that an IRP or RP will not take control of the assets of a subsidiary company. This provision intends to separate between the holding and subsidiary company. However, there was Gorup Insolvency in the case of Videocon and Jaypee Greens Kensington. These situations arose because when the subsidiary company took loan, the holding company stood as guarantor. In the matter of Laxmi Pat Surana, the Supreme Court upheld that the CIRP can be ordered against both CD and the Guarantor. In such situations, the CIRPs may be clubbed, taking the shape of Group Insolvency. In the case of Vodafone, the Supreme Court upheld that the shareholder has only the right of dividend but no right on the assets of the company. However, if the shareholder is a holding company, then in terms of the provision of the Sale of Goods Act, shares held by the holding company in the subsidiary company are treated as its assets. Therefore, if the holding company goes into CIRP, the RP can take control of the assets of the subsidiary company leading to Group Insolvency.

These are the elementary things which are yet to be evolved. More discussions will trigger more dimensions in this direction. Before concluding, I would like to say that the personality develops and grow with wisdom. A wise person carries a commendable personality, and the source of wisdom is nothing but honesty.

Thank you very much.